S. HRG. 104–20

TEAMWORK FOR EMPLOYMENT AND MANAGEMENT ACT OF 1995

HEARING

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

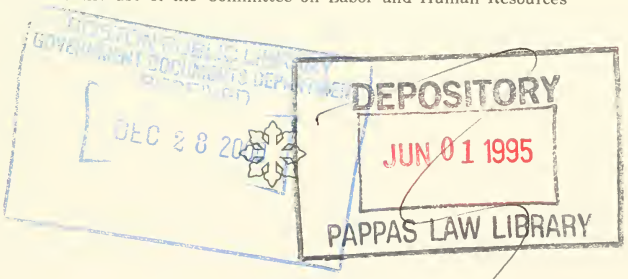
FIRST SESSION

ON

PERMITTING LABOR MANAGEMENT COOPERATIVE EFFORTS THAT IMPROVE AMERICA'S ECONOMIC COMPETITIVENESS TO CONTINUE TO THRIVE, AND FOR OTHER PURPOSES

FEBRUARY 9, 1995

Printed for the use of the Committee on Labor and Human Resources



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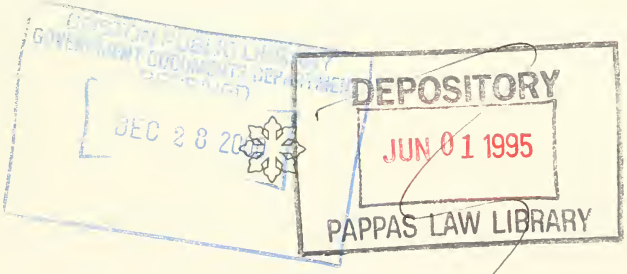

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TEAMWORK FOR EMPLOYMENT AND MANAGEMENT ACT OF 1995

THURSDAY, FEBRUARY 9, 1995

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:37 a.m., in room SD–430, Dirksen Senate Office Building, Senator Nancy Kassebaum (chairman of the committee) presiding.

Present: Senators Kassebaum, Frist, DeWine, Gorton, Kennedy, Pell, Simon, Harkin, and Wellstone.

OPENING STATEMENT OF SENATOR KASSEBAUM

The CHAIRMAN. The hearing will please come to order.

There are going to be other Senators coming—I am not going to be the only one here—but Senator Kennedy has said please go ahead and start. He is on his way, as are other Senators.

Before I call the first witnesses, let me just give an opening statement which will give a little background on the legislation that we are going to be discussing today.

We are going to be hearing testimony on the cutting edge of human resource practices. It is always hard for us to begin to think anew of ways that we can work in the workplace or work in the Congress; we have a hard enough time just thinking about ways to change our committees. But I think that if we really want to get ahead and make a constructive effort wherever we are, that we have to be willing to think anew.

Employee involvement programs have grown steadily over the last several years, and I think it is important that the committee listen to employees, management, and organized labor as they describe what is happening in the American workplace.

I believe that both labor and management must take a fresh approach to worker-management relations. The old, adversarial approach squanders resources and increases worker and management frustration with the system.

In the private sector more and more these days, we are seeing that cooperation is taking the place of confrontation. Both workers and supervisors are beginning to realize that they are on the same team; they are fighting for a higher standard of living, greater market share, and improved productivity. Both workers and management need to cooperate if they are to enjoy mutual prosperity.

One tool that workers and supervisors need to meet the challenge of economic competition is employee involvement. Workers

have an important contribution to make, and often they know more than their supervisors do about how to get the job done.

Employee teams now tackle problems that only corporate executives would have dealt with in the past—quality control, budgets, scheduling, and hiring decisions.

I think it is very important for us to be able to encourage this kind of involvement. In my mind, it takes nothing away from the work that unions have done; it takes nothing away from employees who have performed these functions in the past. But we must be willing to consider new ways of doing things.

Regrettably, Federal labor law establishes a significant legal barrier to worker-management cooperation and employee involvement. In the National Labor Relation Board's Electromation decision, the board invalidated one company's worker-management committee. The decision has called into question the legality of all employee involvement programs.

Along with Senators Jeffords, Gregg and Gorton, I have introduced the Teamwork for Employees and Management Act, which is Senate bill 295, which would permit workers to meet with supervisors to address issues of mutual concern, including quality and productivity issues, without running afoul of Federal labor laws.

This bill is not a new Federal program. It is not designed to give employers free rein over employees. Instead, it simply removes the legal barriers to private sector employee involvement programs and allows the flexibility for a variety of different employee team efforts to move forward.

This morning, we will hear from members of worker teams at TRW, Eastman Chemical, Universal Dynamics and Electromation, as well as experts in labor law. I look forward to hearing the testimony of the witnesses this morning.

Senator Pell, welcome. Do you have an opening statement you would like to make?

Opening Statement of Senator Pell

Senator Pell. Yes. Thank you very much, Madam Chairman, and thank you for holding this hearing.

As some of you know, I have had a longstanding interest in what we can do to establish better relations between labor and management. Before coming to the Senate, I became familiar with the system of labor-management relations in various technologically advanced nations in Europe. In many of those nations, employee representation on the various company boards is mandated by law. While not directly transferable to the United States, I do think we can learn from the European experience and their "co-determination," which is what it is called when you have an equal number of labor and management on boards of directors. It can work and can produce better labor relations peace than is otherwise the experience.

In the past, during the heyday of the assembly line, a worker performed the same procedure hour after hour, day after day. The old view of manufacturing—thank goodness, the old view—was "Check your brains at the door." Employers were interested in two hands and ten fingers, and that was about it.

That philosophy is no longer valid. Our work is becoming more and more high-tech, with integrated circuits replacing vacuum tubes, and we no longer compete with each other but with other nations. It is no longer acceptable just to produce in quantity; now we must make goods with quality, and that is most important.

To meet these demands, we need all our players on the field, not just the ones with the white collars. The men and women in the production plant know, through experience, things about the products they produce that the engineers, the accountants and the managers can never know. They know how to produce better, smarter, faster, and cheaper; vital information for any enlightened, competition-minded company.

With these ideas in mind, I introduced legislation in the 103rd Congress that would amend the National Labor Relations Act to permit employers and employees to join together to form workplace committees, with everyone bringing their concerns and their solutions to the table.

Senator Kassebaum's TEAM Act I think places too much control of the workplace committees in the hands of employers, with little protection or guarantees for the employees. Language of this kind resurrects thoughts of the "company unions" of the past, which I know is not what the Senator from Kansas means, but it could move in that direction.

So I just want to throw out on the table this thought of co-determination, which has worked in keeping labor-management peace in Germany and the countries of Europe, because you have a board of directors evenly divided between labor and management. In our own country when the idea is floated, you find both labor and management are afraid of co-determination and do not want it, and I hope that this hearing might enlarge on that.

Thank you.

The CHAIRMAN. Thank you very much, Senator Pell. I appreciate it, and know that you have a keen interest in addressing these changes in the workplace as do I, and I look forward to seeing what we can come up with. Before we begin I have statements from Senators Harkin, Mikulski, and Wellstone.

[The prepared statements of Senators Harkin, Mikulski, and Wellstone follow:]

PREPARED STATEMENT OF SENATOR HARKIN

I appreciate having the opportunity to express my strong opposition to S. 141 which would repeal the Davis-Bacon Act. Repealing this act will have serious impacts on our nation. Over 500,000 construction workers earn the prevailing wage because of the Davis-Bacon Act. Do they deserve to earn less than other construction workers in their area simply because they work on a project supported by the Federal Government?

The people that build our highways, bridges, and federal buildings ought to receive a fair and decent wage. Many will claim that the hourly wage for construction workers is already too high, but they fail to give the full picture. Construction work is seasonal and sporadic at best, many of these workers must earn enough to support their families on one third fewer hours than most other workers.

A 1993 study by the Bureau of Labor Statistics showed that the average annual wage in the construction industry is well below that of many other major industries.

I would hate to think what the repeal of Davis-Bacon would do to that average and what effect that would have on the families of construction workers. These workers ought to be able to raise their families, feed and clothe them, and educate them. They are the people that build this country and we can accept no less than that.

We can also accept no less than the best quality work for our tax dollar. Without the Davis-Bacon requirements it would be far to easy for a contractor to use less skilled, less experienced workers. And frankly, as a taxpayer, if I am going to be paying to build something under the auspices of the Federal Government, I want it to be built well. I want it to be built to last by quality, skilled labor. Cheaper is not necessarily better. Shoddy construction will cost more in repairs and replacement in the long run than building it right the first time. Repealing this act would be bad policy and unfair to America's workers, it would have serious and expensive consequences for our country.

PREPARED STATEMENT OF SENATOR MIKULSKI

Madam Chair, I am here today to oppose the repeal of the Davis-Bacon Act.

The Davis-Bacon Act requires contractors who are getting paid under a Federal public works contract to pay their workers the prevailing wage in the local area.

What's this mean to people in their day-to-day lives? It means a liveable wage and a decent job for a hard-working American—that is the heart of the Davis-Bacon Act and goes to the core of my values. I stand strong by these values and by the values in the Davis-Bacon Act.

Millions of Americans are facing fiscal crisis. The middle class is playing by the rules, working hard at their jobs, at raising their families, and at contributing to their communities. But they feel like they are going nowhere because of wage stagnation.

Building trades have been especially hard hit in recent years.

The men and women who work in the building trades don't own stock certificates. But they've invested in America. They have invested their sweat equity. But the promoters of "the Davis-Bacon Repeal Act" wants to take workers' sweat and keep the equity.

I believe that is wrong.

I believe we need to create more good jobs with a liveable wage, not decimate decent jobs.

The essence of Davis-Bacon is Federal funds will be used to pay workers a wage that is fair in their community.

I am a blue collar Senator, and I believe that Davis-Bacon is an act of basic fairness to blue collar workers across the United States.

Madam Chair, that is why I stand sentry against any effort to repeal the Davis-Bacon Act.

PREPARED STATEMENT OF SENATOR WELLSTONE

Our hearing today is designed to explore a matter that's critical to American working men and women. It goes to the very core of Federal labor laws that are supposed to protect workers' rights to organize and bargain collectively in a free and democratic workplace. It goes to the central right to be represented by an independent labor organization.

Contrary to the claim of its proponents that it's a harmless clarification of existing law, the bill proposed by Senator Kassebaum would further impair the right of workers to freely choose their representatives. At least in principle, if not always in practice, that right is supposed to be protected in this country under our labor laws. By permitting the unilateral creation by an employer of an employee committee, this bill violates the fundamental principle that in bilateral relationships, each party must be free to choose its own representatives and to decide those issues about which it wants to negotiate. Otherwise, instead of bringing two sides to the table for real negotiations, employers end up being on both sides of the table at once. To combat that problem, labor organizations must be free of employer control or interference.

I don't think I need to rehearse the long and sorry history of labor relations in this country in the 1920's and '30s to illustrate the problems with sham company unions. In attempting to meet employers' desires for greater flexibility, we must not overlook decades of American workers' struggles to secure and maintain legitimate collective bargaining rights.

As former Senator Wagner observed on the Senate floor many years ago, when the Wagner Act which is named after him was first passed, one of the central tenets of labor law is that workers and employers must be able to deal with each other on an equal footing. I'm all for flexibility and international competitiveness and high-performance workplaces, and my state has led the way in some of these areas. But not at the expense of workers' rights. As former union president Douglas Fraser observed in the Dunlop Commission report, real participation and cooperation means democratic participation and cooperation between equals.

The National Labor Relations Act (NLRA), which this bill would amend, at least creates a mechanism—the selection by workers of a bargaining representative—through which American workers can establish independent trade unions that are key to real representation and collective bargaining. It was carefully designed to prohibit employer-dominated unions, and it has stood the test of time very well.

Proponents of S. 295 claim that it is necessary to "clarify" the application of the NLRA to workplace employee involvement programs in a new climate of labor-management cooperation. They claim it is necessary to address ambiguities raised by a 1992 National Labor Relations Board (NLRB) decision in the Electromation case which involved a firm in Elkhart, IN. Frankly, I am not sure what they're talking about. I haven't seen much evidence of an improved labor-management climate, and I haven't seen any evidence of the need for this legislation. In fact, in a political environment in which workers cannot even come close to getting a permanent

ban on the replacement of striking workers enacted into law, when workers are afraid to exercise their most basic employee right of all, the right to withhold their labor, the claims about a "new climate" of labor-management cooperation ring hollow.

In the Electromation decision, the NLRB ruled that certain types of workplace organizations commonly referred to as "employee participation committees," "action committees," or "quality circles" may be illegal unless these committees are free of employer domination, and unless employees have the right to choose their own representatives on the committees. The NLRB—including those members of the board who were appointed by Republican Presidents—applied a traditional interpretation of the labor laws, and concluded that this was a clear case of a company-dominated employee organization that was basically thrust upon workers under the guise of an employee participation scheme.

It was thrust on them, not coincidentally, at about the same time that a union organizing drive was getting underway in the plant—a familiar pattern in these disputes. We'll hear about that situation from the perspective of a worker involved later today, and I look forward to her testimony. Following the NLRB decision, a Federal court in the seventh circuit then upheld the NLRB ruling in a unanimous decision.

In politics, perception is often more important than reality, and I think that is the problem we are faced with today. In looking over the evidence, I see a troubling contradiction. On the one hand, proponents argue that there are over 30,000 employee involvement programs across the country right now, and more being created each month. On the other, they claim that the law needs to be changed to allow these committees to flourish. What seems clear to me is that the practical result would be to allow committees to get into all sorts of areas of mandatory bargaining—including wages and working conditions—that they're prohibited from addressing now.

Current law certainly does not prohibit all employee involvement committees nor other mechanisms to enhance employee-employer communication. The Electromation decision merely interprets the law to ensure that employee involvement programs are structured so that they don't infringe upon the legitimate rights of employees to select their own representatives to committees, and don't infringe upon legitimate collective bargaining procedures. The prohibition in current law against employer-dominated sham unions should not affect legitimate efforts to encourage employee-management cooperation in the workplace.

This bill is a solution in search of a problem. That's why Congress should avoid hasty legislative actions to amend the NLRA to overturn decades of carefully-crafted NLRB decisions and Federal court rulings in this area. In reality, the Electromation decision is very narrow in its scope, addressing a particular set of facts and circumstances at a particular workplace.

In fact, it is fairly easy for companies to structure employee involvement programs so that democracy in the workplace and worker choice are protected, and many have. Prominent management attorneys, one of whom was a former chairman of the NLRB, testified to this in a paper he presented to the Dunlop Commission. In

fact, he even had the candor to observe that "while I represent management, I do not kid myself. If section 8(a)2 of the NLRA were repealed, I have no doubt that in not too many months sham company unions would again recur."

That's not a labor union official making that claim—that's a distinguished management attorney. When you consider that S. 295 would effectively repeal the prohibition on employer dominated committees, or at least make the standards so vague as to be ineffective, you begin to see the real problem, and the real agenda of some who are supporting this bill. In fact, I suspect that one real reason the management community has pushed this bill so hard is that some of them are worried that many existing employee participation programs could not withstand scrutiny of the NLRB under current law.

Today many companies around the country are using many and varied forms of employee involvement structures, not all of which could or should be addressed in legislation. Electromation and other subsequent NLRB decisions have not significantly impeded these efforts. In fact, a recent study found that the NLRB had acted against only 17 such employer dominated committees in the last eleven years—less than two per year—and that most of those were in workplaces where other unfair labor practices had been discovered and documented, including interrogations, threats to shut down and lay off workers, surveillance, and discriminatory firings. I know of no instances where the NLRB has recently ruled against employee participation programs in the absence of other illegal practices. I ask unanimous consent that studies by Mr. James R. Rundle and Mr. Charles J. Morris be reprinted at the end of my statement.

Of course, some of these employee committees provide useful channels of communication between employees and employers, and should be encouraged. But as the Electromation decision warns, companies should be careful in how they structure committees so that legitimate bargaining and other rights of employees are protected.

This bill is not only unnecessary, but it could do serious harm to workers throughout the country. I've heard from numerous Minnesota workers concerned about this bill, but frankly I've not heard from many Minnesota employers who are unhappy about the guidelines for employee involvement set by current law. Minnesota employers have been living with this law for decades.

I had thought conservatives generally liked to be in the wait-just-a-minute category when it comes to changing the NLRA. Not on this issue, apparently. We should not attempt to change the law in this area unless and until a clear body of evidence is developed that legitimate employee involvement programs that deal with issues incidental to collective bargaining matters are being constrained, and that is not the case. In fact, they are growing rapidly. The guiding maxim here should be: "If it ain't broke, don't fix it."

If we are going to talk about amending the National Labor Relations Act, then we should start by considering all of the numerous suggestions offered by the Dunlop Commission to make it easier for workers to organize and bargain collectively, to get recognized without long and painful battles, and to gain first contracts quickly

once recognized. And we might even broaden the debate to consider some more innovative approaches that were not put forth by the Commission. We need comprehensive reform of the rules covering organizing efforts. But whatever we do, let's keep in mind the Commission's recommendation that we must carefully maintain the current prohibition against employer-dominated labor organizations. This bill would be simply another means of eroding worker rights that are already seriously threatened across the country.

I urge the committee to reject this ill-considered and unnecessary legislation, and to instead hold hearings soon on all of the many Dunlop Commission labor law reform recommendations designed to bolster workers' rights to organize and bargain collectively.

The CHAIRMAN. It is a pleasure to call the first panel of witnesses.

Going from my left to right, it is a pleasure to welcome from TRW's Inflatable Restraint Systems in Cookeville, TN, Don Skiba, who is plant manager; Julie Smith, team advisor; John Albertson, team member, and Angie Cowan, team member.

And from Eastman Chemical's Kingsport, TN facility, we welcome Kevin King, who is a team member, and Lori Garrett, who is a team member.

Welcome all. I know that Senator Frist, who is a member of this committee from Tennessee, will be here any moment because he wanted to extend a special welcome.

I think we will start in the way I introduced you.

Mr. Skiba?

STATEMENTS OF DON SKIBA, PLANT MANAGER, TRW, COOKEVILLE, TN; JULIE SMITH, TEAM ADVISOR, TRW, COOKEVILLE, TN; JOHN ALBERTSON, TEAM MEMBER, TRW, COOKEVILLE, TN; ANGIE COWAN, TEAM MEMBER, TRW, COOKEVILLE, TN; KEVIN KING, TEAM MEMBER, EASTMAN CHEMICAL, KINGSPORT, TN; AND LORI GARRETT, TEAM MEMBER, EASTMAN CHEMICAL, KINGSPORT, TN

Mr. SKIBA. Good morning, Senators, ladies and gentlemen.

My name is Don Skiba, and I am the plant manager for the TRW Vehicle Safety Systems Plant in Cookeville, TN. Cookeville is a city located midway between Nashville and Knoxville on Interstate 40 in the north-central part of Tennessee.

At TRW, Cookeville, we manufacture passenger airbag systems. In fact, at TRW, Cookeville, we manufacture the best passenger airbag systems in the world.

I have with me this morning a group of my fellow employees who will talk to you about their experiences with various employee involvement activities at our plant. Before they do, I would like to take a minute and tell you a few things about our facility.

The TRW, Cookeville plant is a 310,000 square-foot facility. Construction began on the plant in 1989. We shipped our first airbag products to automotive customers in mid-1991.

When we started the facility, we knew we had a tremendous challenge ahead of us. We would be shipping a brand new, high-tech product, one that had not been made before in any great numbers. We would be shipping 40 different products to 12 different automotive customers on four different continents. Each of our cus-

tomers has different systems and procedures, and in fact different corporate cultures.

The airbag product itself, as you can well imagine, is a product where we would have to operate in a zero defect environment, and we would have to grow to our current size of about 800 employees in a very short period of time, using some very sophisticated, high-tech equipment.

The management team decided early on that the only way we could meet our goals would be to operate in a culture of total employee participation, where all employees were involved, where open communication was an everyday fact of life, and where everyone participated and had the opportunity to drive positive change in his or her own workplace.

Our plant today is a team-based organization. It is an organization where no one punches a time clock, where we are all treated the same, where we all have the same benefits, and where every employee has the opportunity to contribute.

Employees are involved in a wide variety of programs, and we have provided some information on those programs in our attachments to our testimony. Our employees will talk to you this morning about their experiences in this environment, and I think you will enjoy it.

The CHAIRMAN. Thank you very much, Mr. Skiba.

[The prepared statement of Mr. Skiba may be found in the appendix.]

The CHAIRMAN. Ms. Smith?

Ms. SMITH. Good morning. My name is Julie Smith. I am a team advisor, and my job is to help lead and direct several of our assembly lines.

Employee involvement is what makes our operation a success. For some of us, it is where we spend the majority of our time, and for others of us, we just call it home because we are there so often.

But what employee involvement means to me is that when I am getting ready to come to work, or my people are getting ready to come to work, we look forward to starting our day; and when each of us go home in the evening, we can take pride in the fact that we know we have had a direct influence over our work environment.

How does employee involvement work? How do manufacturing technicians, who actually put airbags together, to office staff personnel, engineers, team advisors, maintenances, all come together to make things happen?

Well, in Cookeville, we do that in many different ways, but this morning I am going to share two in particular with you. The first of these is our new employee selection process. To me, this is the most important process because it is through this process that we bring people into our plant who are going to be helping us make decisions and drive change—the people who are TRW. Manufacturing technicians and management work together to make sure we hire the right people.

No matter what area of the plant you work in, you are involved in interviewing prospective candidates for employment, and some questions we ask are: Will this person be a team player? Are they going to come to come to TRW and help us solve our problems? Are

they ready to come to work and use their minds as well as their hands?

And then, if we can answer yes to all of those questions, we invite that person onboard to come join our family.

The second process that I am going to tell you about this morning is very critical for us. It is our peer review policy. The way this works is if an employee—and that means any employee—receives a final step in the corrective counseling process, either final written warning or they are terminated, they have the right to appeal that decision to a jury of their peers, where the peer representatives always outweigh the members of management.

So that for example, if a manufacturing technician should receive a final written warning, and they want to appeal this decision, out of a random selection, they choose three of their peers and two members of management to sit on a panel. The panel then listens to them present their cases, and if they find that in fact the decision was unjust, then that person comes right on back to work with no loss in his benefits and all his back pay reinstated. But if the panel decides that the decision had been fair, then they just confirm that for us, and it holds true. So the decision the panel makes is the final decision.

So the new employee selection process and the peer review policy are two examples where, no matter what area of the plant you work in, you are involved in making decisions.

What does this mean for TRW? It means that our employees are empowered. It means that we make decisions, and we make a difference. When we all come together with all of our ideas, creativity and strength, we reach carefully thought out decisions that we all can support and buy into.

The common thread through all of this is that we each have one common goal, and that is to protect and ensure job security.

Thank you.

[The prepared statement of Ms. Smith may be found in the appendix.]

The CHAIRMAN. Mr. Albertson?

Mr. ALBERTSON. Good morning. My name is Johnny Albertson, and I work at TRW in Cookeville, TN as a manufacturing technician I. That means that I work on the line making airbags. I am married, and I have two children. I came from a large family of 12 in which I was second-oldest.

I had worked in a grocery store for 15 years before coming to TRW. In looking for another job, I found that I had to return to school and receive my GED. I received my GED a month later, and I was hired at TRW.

There were 10 other people hired at the same time I was, and at the time I did not know they were going to be my team. We were all assigned to the same line, line 209, where we make airbags for Chevy Lumina.

The best example that I can share of employee involvement I think is something we call CIP. CIP stands for "continuous improvement process." On my line, we started this process by working with support groups which are engineering, maintenance, software, materials. We met in a large room where we had a large board. We put on one side of the board all the problems that the line was hav-

ing, and on the other side we put the solutions that we came up with as a team.

A few months later, we started seeing some of these changes go into effect. Before we started CIP, we were getting 48 parts an hour out, and we were struggling to do that. After CIP, I have seen as many as 100 parts come off the line.

The thing about it is it is easier now to get the 100 parts out an hour as it was the 48 that we were struggling with.

One thing that has come out of this is our teamwork. For example, if you cut two steps out on a part, and you run 100 parts an hour, that would be 200 steps that you would save. If you had 10 techs on a line, that would be 2,000 steps that you would save per hour. In an 8-hour shift, that would be 16,000 steps that you would save in this.

One of the other things that I learned through CIP is the open door policy that TRW offers. I feel comfortable now going to any of my support teams, whether it be engineering or software, and I can share either a problem with them or a solution that I have come up with.

The atmosphere that I came from was a "chain of command" type atmosphere. It is different at TRW, and I love this.

It is interesting how continuous improvement applies to me personally. Since I got my GED, I have taken computer classes on site at TRW in Lotus, Wordperfect, Network and Paradox. Now I am attending Nashville Tech in maintenance, trying to get my associate's degree. And the best part about this is that the company pays my tuition.

I want to thank TRW today for my future.

Thank you.

[The prepared statement of Mr. Albertson may be found in the appendix.]

The CHAIRMAN. Thank you, Mr. Albertson.

The CHAIRMAN. Ms. Cowan?

Ms. COWAN. Thank you. My name is Angie Cowan, and I am rework coordinator at TRW, Cookeville.

The biggest difference between TRW, Cookeville and other businesses and plants is our employee involvement and communication. Other plants, businesses, and even our Government, could use TRW's employee involvement as a role model and be just as efficient and just as effective. The only problem with employee involvement in America is that there is not enough of it.

Our lines are based on the six fundamentals of manufacturing, which are quality, delivery, effectiveness, safety, waste elimination, and housekeeping. There are coordinators for each of these fundamentals, which are rotated on a monthly basis.

Coordinators take responsibility for monitoring improvements and issues related to their fundamentals. We also have a line coordinator who is responsible for knowing and opening our work schedule each day.

We have team meetings whenever needed to discuss team issues such as line rotation schedules, changes of lunches and/or breaks, changes of our delivery schedule, and safety or housekeeping films.

We also have an emergency response team which I am part of, which is voluntary members from each section of the plant. We

have learned how to use a fire extinguisher, we have learned CPR, we have learned how to handle blood, and we have learned how to think in an emergency.

We have skip level meetings in which representatives from the lines meet with their manager's manager and an HR representative to bring up issues or resolve problems. Answers to problems are posted on our communication boards on our lines for all the employees to see.

Employees are also involved in a lot of community activities. The Angel Tree at Christmas, which is the biggest thing for us, is one of my favorites. Children's names and wishes are placed on tags and put on the tree, and employees work together to make their wishes come true.

There is also the Corporate Cup Challenge, where TRW is reigning champion. It is a big fitness event in which TRW gets involved with the other businesses and organizations and competes in physical events.

We are also given a chance to give to the United Way; it is not mandatory, but it is offered. And TRW employees in businesses is probably one of the highest involvement in the country.

We also have a Day of Caring program in which TRW pays for each employee to do 1 day of community service, either building things or improving things as a team.

We also have adopted a local elementary school, where we save our aluminum cans, we offer our time to volunteer for their carnivals, and we also judge science fairs.

The communication at TRW absolutely cannot be beat. We know that at any time, we can call anybody in the plant without having to have a middle person. That is the very best thing.

We have to be able to work together because our customers are very demanding, and they expect quality parts on time. If we cannot communicate and cannot work together, we will miss shipments, we will lose customers, and we will eventually lose our jobs.

Our lines are families. Everyone who has anything to do with our lines is part of our work family, including engineers, business team managers, team advisors, quality techs, and material techs. So in order to have a successful team, we have to be able to communicate.

One of the best things that I get to do at TRW is I get to give plant tours. These are exciting to do, because I get to talk to people, regardless of their job titles, on a one-on-one basis and let them see how excited I am about TRW. I have been at TRW 3 years this month, and I can honestly say I enjoy coming to work every, single day.

I have gotten to tour some real cool people. I have toured Ford executives, I have toured Chrysler executives, I have toured TRW executives, and I have even toured the president of Renault. And if you all want to come on down, I will give all of you a personal tour.

This is my closing statement, and I want everyone to think hard on this. How many of you can say that you have got the best boss in the world? I can. I really love my job.

[The prepared statement of Ms. Cowan may be found in the appendix.]

The CHAIRMAN. Thank you very much, Ms. Cowan.

Mr. King and Ms. Garrett are representing the Eastman Chemicals plant in Kingsport, TN.

Mr. King?

Mr. KING. Thank you, Madam Chairman.

I would like to share with you a little bit about what Eastman Chemical Company is and what it does. We are the home office in Kingsport, TN, where Lori and I are both from.

At Eastman Chemical, we manufacture a number of chemicals, plastics and fibers. And teamwork is what we feel has enabled us to be the 1993 Malcolm Baldrige Award winner, and also, most of all, to be competitive and successful in a global economy.

I have been with Eastman Chemical Company for about 18 years, and I am currently serving as a quality facilitator. I would like to share with you a little bit about how the company was managed when I first came into the company back in 1977.

When I first came there in 1977, the main thing was being to work on time, punching the clock in, punching out on time. It was very frustrating when you would see ideas or ways to improve the product or change the way things were done, and you would offer those up to a level of management, and sometimes you would see those things come through, sometimes you would not. When they did come through, it was usually in some form of written document that your management or a process engineering would bring by and say, "This is pretty much how we want to see this happen." So your input in getting that suggestion implemented was virtually nonexistent, and because of the lack of involvement, there was a lack of commitment that went along with it.

But in the early 1980's, I started to see that change as we started our participative quality management. We formed what we called natural unit teams, which is where people who work together day in and day out, all in the same work area, pretty much working on similar processes, would get together and look at ways to enhance and change those processes in ways that they could add value to the customers.

For the last 5 years of my career, I have been serving in the facilitator role, working more with cross-functional teams. The department that I am assigned to is the manufacturing department, where we work on four rotating shifts around the clock, and because of that it is hard to get standardization when you have several people who never really see each other except at shift change, who are all operating the same piece of equipment.

So what we tried to do was pull together a couple people off of each shift and put them on the one team to work on a 5-step process to identify and improve the real opportunities for that particular process.

One of the projects that has really meant a lot to me that we just finished up a few months ago was our 3M viscosity control team. We manufacture a material that 3M buys to use in their Scotch Magic Tape—I am sure all of you have used Scotch tape before. Well, in this material that we send to them, one of the things that is very important to them is the viscosity control, the rate at which the liquid flows. And at the time in the early 1990's when we started, we were really working with 3M, but only about one-third of

the material we manufactured was fit for their use, and so we were having a hard time trying to make the business profitable and meet the demands for 3M.

Well, we put together a cross-functional team, and they worked very hard to try to improve the process. And I am glad to say that now we are seeing about 20 percent more of that material meeting 3M's specifications and even more important is the bigger impact, to me and for the company, that we have now been named 3M's sole preferred supplier for this material, which has really increased our business and the operations that I am involved in.

What does teamwork mean to me as an individual working at the company? Our management has worked with us to establish a vision—we call it our "strategic intent"—to be the world's preferred chemical company. For that to take place, 18,000-plus people have to be involved on several different teams to make that become a reality. Without the teamwork, that will never become reality.

I would like to thank you for letting me come and share my thoughts and feelings with you.

The CHAIRMAN. THANK YOU, MR. KING.

[The prepared statement of Mr. King and Ms. Garrett may be found in the appendix.]

The CHAIRMAN. Ms. Garrett?

Ms. GARRETT. Thank you.

I am Lori Garrett, and I have been with Eastman Chemical Company for about 4 years. Unlike Kevin, when I came and started my employment with Eastman, the teams and teamwork concept were already part of the workplace.

When I hired in, it was an entry-level position—we call it the buffer work force—and I was responsible for just general labor and cleanup throughout the plant. My specific job was to clean and dust electric rooms.

One day I was in the shop that I worked out of, and I was filing some of our manufacturing information away in a filing cabinet, and I ran across an old, yellowed piece of paper. The title of it was "An Electric Room Inspection Checklist." I thought, well, really this pertains to my job, and I should benchmark against this and do my job a little better. And I noticed one of the items on there was to see that all the directories were maintained and updated. The directories in our setting would be what you would refer to as a label on your panel box at home to say this circuit feeds my dryer or my water heater; but in an industrial setting, it is much more critical.

And so, as I checked these in each of the electric rooms I was responsible for, I noticed that they were not up-to-date, and as a matter of fact, some had not been updated in several years. And so I made copies and took the originals with me to a meeting with one of my supervisors. And as I lay them down on his desk, the dust went everywhere, and I said, "I want to know what we can do about this."

And he asked, "What do you think we should do about this?" So I tried to name some specific processes I thought needed to be improved and some documents that really needed to be updated. And he said, "Why don't you see what you can do?"

So we formed a team, which we refer to as a cross-functional team, which means we had members from other areas other than

our own. We had members from the engineering division, some operational areas, some systems folks, and other craft people in the electrical and instrument people, like myself. And together we successfully as a team developed and implemented a computerized system to allow all these directories to be updated electronically. And in doing so, we brought our update time from a minimum of 30 days to a maximum of 30 minutes. So you can see just the sheer efficiency that we realized through that.

After we had implemented this program, we evaluated our cost savings. Our tangible cost savings were over $1 million in the first year through engineering's improved design capabilities and the sheer accessibility to the information. We also improved our equipment reliability through the plant. We know that this circuit really does feed this equipment, which as I said before, in an industrial setting is highly critical.

That was one of the cross-functional teams I was involved with, so you can see that that particular team environment was very positive for me.

The other team that I am involved with is what we refer to as a "natural team." It is made up of other people in my crew. We work under the same shop, and we are all the same craft, electrical and instrument. We meet every other week for about an hour and a half, and we have a set agenda that we follow. We begin our meeting with news and information, where any member can voice any particular piece of information he would like other members to know about. Then we go into data review. In that, we have certain measures that we have set aside that we would really like to keep track of, such as overtime measures, or any particular measure we feel is pertinent to our workplace. And we follow those every other week.

Then we go into problems and concerns, where any member can voice anything he or she may feel is of concern. We list those on a board, and we address those in a problem-solving session. Some we can address immediately. Others, we spend a whole problem-solving session on.

At the end of our meeting, we try to evaluate it and make sure we have had good participation, just to benchmark and make sure we are continually improving. Then we plan for our next meeting so we always know what is coming up.

One of the most important things to me about teams that I really want to convey to each of you is that regardless of what position you have at our company, what status or formal power you have, or what status or formal power you lack, you can really have a significant impact, such as my first team experience where our team was able to save the company over $1 million. And since then, that team still meets on an as-needed basis when we receive suggestions or input from other members, and we invite them to come to our team. And we have added another half million dollars in savings since then—and that is just tangible savings. So we are really proud about that.

So I want to convey to each of you how important employee involvement is, especially in our team setting, and I want to thank you, Madam Chairman, on behalf of this panel for having each one of us here to convey that as well.

The CHAIRMAN. Thank you, Ms. Garrett. I want to thank all of you for very interesting and impressive testimony.

I would like to call on first for questions—simply because sometimes, we never get to those at the end of the line, and at the very end of the line is a cosponsor of this legislation whom I would like to call on first—Senator Gorton?

Senator GORTON. Thank you, Madam Chairman. I appreciate that, and after hearing the portion of the testimony that I have heard and reading the rest, I am even more pleased to be a sponsor of the bill which you have drafted and feel, accurately, I think, meets the needs of the 1990's and into the next century far better than do laws that were drafted, quite legitimately, to meet a 1930's mindset.

I have only a couple of questions for you, Ms. Skiba, as management, and I would like some of the other people from TRW if they wish to comment on this as well. Has this team concept evolved out of a feeling that there are as many or more areas in which management and the people who work in a plant are really a part of the same cooperative team, working toward the same end, as against being competitors to divide up a particularly sized pie of money or authority or whatever else one may say it is?

Mr. SKIBA. I think the team-based activities within a number of the TRW facilities have been basically founded on the recognition in our company that people who are in a workplace have the best understanding of their problems and in many cases, the best understanding and ability to solve problems at the workplace level.

So that when we look at our responsibility to continuously improve our products and improve the products that we are shipping to our customers, we know that we have to drive positive change; we know that the people who are working on our assembly lines have a tremendous amount of knowledge, and to maintain our competitive position globally, we have got to have everybody involved.

I think the other thing that is important to know is that the workers that we are seeing in our facilities today want to be involved. They have educational levels and understanding of the complex things that go on at their work stations, and they want to participate and have a say in the way things are done. And we all know that the more people we get involved in problem-solving, the better solutions we are going to come up with. So it is a true win-win.

Senator GORTON. You said one thing in that answer that referred to international competition. Is some of this driven by the desire to be able more effectively to meet international competition, and do you know if your competitors overseas engage in the same kind of team activities?

Mr. SKIBA. We have not benchmarked directly against our specific competitors, but a lot of the activities that we have been involved in have come from our general benchmarking against our international competition.

One of the interesting things is we have done the benchmarking, but as we have come forward, the programs that we have work, they are highly effective, and everybody in the facilities likes them. So it is just a good win-win for us.

Senator GORTON. Do any of the other members of your team want to comment?

Ms. COWAN. I will—and just so you all know, this is so cool. When you get hired at TRW, and you go through the interviews and everything, you know that you are not going there just to work your 8 hours and go home. When we give our interviews, we let people know that there are things that we become involved in, and it is nice to know through the things that we do that we know what is going on.

We have quarterly meetings, and on our communication boards, we have percentages, or comparables or whatever, of what we plan and what we actually do, and for those of us who do not quite understand that when we go and look at it, we have our quarterly meetings, and they explain those to us so that we know exactly what is going on in the plant.

And as far as competitiveness, we have to stay competitive toward ourselves, to always do better, because if we do not stay on top of things, we can easily start falling a little short.

At TRW, as far as Cookeville, everybody wants to work there because we are the coolest, and we are the best plant, and it is also the cleanest plant—you all could actually eat off the floors there. But it is the place to be, and I think a lot of that has to do with the fact that we have such a good reputation as far as employee involvement, because you do go in, and you do get involved, and you do know what it going on as far as scheduling, delivery—as a matter of fact, they make sure you know what is going on so that you can stay on top of things. It is really a good place to work.

Senator GORTON. Thank you, Madam Chairman.

The CHAIRMAN. Thank you, Senator Gorton.

Senator Kennedy?

Senator KENNEDY. Madam Chairman, I will yield to the other members who are here—Senator Pell?

Senator PELL. Thank you.

I have just a couple of questions as to how the team members and the leaders are chosen. Are they elected, or are they appointed? I would ask Mr. Skiba that question.

Mr. SKIBA. The team leaders in our facility are chosen by management, and it is done in a fairly normal process, where the people who have shown the greatest leadership skills are given additional leadership training and become team leaders.

Senator PELL. And who decides the functions and the authority of these teams?

Mr. SKIBA. As far as the functions and authority of the teams, it has been an evolutionary process. Our goal is to continually have the teams take on more and more of the workplace decisions.

We have seen that as we have evolved, putting more and more emphasis on the team-based activities, particularly in our facility, where we have six different fundamental areas that each team is responsible for, and as we have put more power into the teams, our performance has continued to improve. And in our facility, across-the-board in all of the areas of performance, whether it be delivery performance to our customers, our safety record, the housekeeping and cleanliness in the facility, our scrap rates, and so on, all of these measurements that you would look at have significantly im-

proved as we have put more and more power in the teams. There is a good level of ownership.

Senator PELL. Mr. King?

Mr. KING. Senator, I would like to share a point of view on that as far as Eastman and the way our team leaders are selected.

On most of our teams, we use shared leadership. That is, the team leadership will rotate between team members. We have another type of team where we determine that we know we have a problem from customer feedback or something, and it is pretty much specified what the objective of the deliverables of that team is, and a team leader will be chosen at that time, and then, sometime through the project that might rotate from that person onto another team member. But as far as specific management choosing a team leader, that team leadership is shared throughout that team's meeting, whether it is a cross-functional, and when they achieve their deliverables, that team is disbanded, or if it is a natural unit team, it is ongoing.

Senator PELL. But who does the selecting? Does the labor side do the selecting, or would the management do the selecting of the labor members?

Mr. KING. If it is more a cross-functional team, where we know we have a problem going in, the management will identify and kind of put together a charter stating, you know, this is the problem, and then the operators of the teams themselves will get together and decide who all we need to have on that team, and the team leader will be chosen at that time to start. So the actual team members themselves decide that. Management might help put together what some of the objectives are and some input into it, but as far as actually selecting who is going to head and drive this project, that is actually selected by the team.

Senator PELL. Do any of you have any views with regard to codetermination, as I described earlier, a system whereby management and labor are about evenly balanced and selected by management, and labor is selected by labor?

Maybe Mr. Skiba has a thought.

Mr. SKIBA. I really do not know. I am not that familiar with that subject.

Senator PELL. You do not have an instinctive feeling pro or con on that?

Mr. SKIBA. I think one thing that I will add as it relates to codetermination is that from a management perspective in our facility, we have a large number of teams in our facility. We have team leaders who are, say, team leaders for three or four different assembly lines. But each of our assembly lines has a number of different team-based activities that are ongoing, and in those particular instances, the people determine their own team leaders, and we encourage that. What makes teams effective and what provides energy to teams often is the fact that they are selecting their leaders, and so on.

So that within the context of the way that that operates in our facility, it works very well.

Senator PELL. Thank you. I have no further questions at this time, but Madam Chairman, I would hope that the record could be

kept open so that any memoranda on how these co-determination selections are made could be inserted in the record.

The CHAIRMAN. Yes. Without objection, that will be done.

Senator PELL. Thank you.

The CHAIRMAN. Senator DeWine?

Senator DEWINE. I have no questions, Madam Chair.

The CHAIRMAN. Let me ask a few if I may, just to follow through a bit on how the teams are selected. I am guessing that at both Eastman and TRW, the management more or less selects the team that will either be specifically addressing a problem at Eastman or that would be at TRW; is that the case?

Ms. SMITH. That is not always the case. Often, what we refer to as a "general team" may be a particular line. For example, we have a Ford Taurus line, and there are 10 people on that line. We also have the line that makes the airbags for the Mustang, and there may be seven people on that line.

As a way of referring to those people easily, we would call them the team for that line. But there is nothing to say that a person on my line—maybe we have a problem with our doors getting scratched a lot, and maybe that other line has a problem with their doors getting scratched a lot—there is nothing to stop us from any time during the shift saying how about two of us getting together to see what we can do about this problem, and forming our own team, without any direction from anybody except that we know we have a problem, and we are determined to solve it so we can reduce our costs and in the end see more benefit for ourselves.

The CHAIRMAN. So there is a lot of flexibility among employees to pretty much put together their own group if there is a problem they want to address.

Ms. SMITH. Yes, ma'am. We can do as much as we want to do. We are given the general bounds by being told you belong to this team, and these people make this product, and you will work together. But there is nothing to stop me from going to any area of the plant and doing my own problem-solving, gathering team members.

So you do it on your own, and you can take as much ownership and power and authority as you are willing to give of your time.

The CHAIRMAN. In your testimony, Ms. Smith, you listed several things that you were involved in, and one was interviews, and also a peer review process. When there is an employee who has a problem, did you say the employee himself or herself could choose those who would sit on the peer review?

Ms. SMITH. Yes, ma'am. This is only if the step is a final disciplinary step. If it is the first part of counseling, that is something that is kept private and behind closed doors that is worked out with that person's advisor and himself or herself. If you get to the end—and it is the end if you are either at a final written warning, or you are terminated—you have the right to appeal that decision, and this is how it works.

When you come in and you are sat down and told where you are at in the process, you are then explained again the peer review policy, and you are given information on the peer policy. You are given 3 days to decide if you would like to exercise your right to appeal that decision. If you get the paperwork back, and you decide that

that is what you want to do, then anyone in the plant—if you are a manufacturing technician, anyone who is not currently in any form of corrective counseling—their names are put into a hat, and all the management names are put into a hat. Five names are drawn from the manufacturing techs. One of those, you can automatically knock out; one is an alternate, and three people you select—as the employee who has the problem, you select these three people to sit on the panel. The same thing is done with the management members. One of the names is totally tossed out. The other is decided to be an alternate by you, and the other two are decided by you to sit on this panel, where there are five members, so obviously, the peers are the three, and the management are the two. So the peers outweigh the management, and the decision that that panel makes is final.

The CHAIRMAN. And there are about 800 employees at the plant in Tennessee?

Ms. SMITH. Yes, ma'am.

The CHAIRMAN. Does TRW have this throughout their plant system?

Mr. SKIBA. TRW has the peer review policy in a large number of our facilities, yes.

The CHAIRMAN. How many employees at the Eastman Chemical plant?

Ms. GARRETT. We have 14,000 located in Kingsport. The actual company employs 18,000-plus.

The CHAIRMAN. And does the team selection pretty much work at Eastman as it has been explained at TRW?

Ms. GARRETT. Well, the example I cited to you to begin with, the problem was recognized by me, so I was actually the team leader at the lowest entry level that there was in the plant. So there is a tremendous amount of flexibility in the plant on actually selecting the members of a cross-functional team. It is who can have the most input there, and the flexibility is one of the things that we value most.

And to comment on Senator Pell's remarks, we rotate that team leadership within a natural team, so other members who work out of your same shop actually share that team leadership, and it is a rotated responsibility.

The CHAIRMAN. And in both cases, it is not necessarily management that picks the team?

Ms. GARRETT. No, ma'am.

The CHAIRMAN. Thank you very much.

Senator Simon?

Senator SIMON. Thank you.

First of all, in general, employees and management have to be working together; that is part of the future.

Mr. Skiba—and I apologize for not being here; we had a markup in the Judiciary Committee, but I have read your testimony and the testimony of the other witnesses—is anything you are doing now illegal?

Mr. SKIBA. Senator, I do not know. I do not know the total bounds of the law. In fact, that is something that I think somebody else would have to answer. I really do not know.

Senator SIMON. Well, I assume you checked this out with someone, counsel for your plant?

Mr. SKIBA. The team-based activities that we have in our facility and throughout our company have been an evolving process. We have been operating as plant managers on the assumption that they are legal.

Senator SIMON. Has anyone suggested that they are illegal?

Mr. SKIBA. No, not to me they have not.

Senator SIMON. So you are not testifying here that we need a change in the law?

Mr. SKIBA. I am testifying—and I think you can talk to our team—but in my case, I basically came to talk about how team involvement activities and employee participation activities have assisted our facility and our company.

Senator SIMON. And I appreciate that.

A question was asked about TRW, generally—and I do not know if these figures are accurate, and Mr. Skiba, you correct me. You also have a TRW plant Ross Gear that makes gearboxes for large trucks. I believe that is a union-represented plant, and their average wage runs $3 to $6 higher than at your plant; is that correct?

Ms. SMITH. Senator, could I make a comment there? We have a division of Ross Gear Steering and Suspension in Rogersville, TN, and that is a nonunion facility.

Senator SIMON. Ross Gear is a nonunion facility?

Ms. SMITH. Our plant in Rogersville, which is a division of the Steering and Suspension that makes the gears, is a nonunion facility.

Senator SIMON. Now, maybe I am wrong——

Ms. SMITH. Well, I worked there for 18 months, and I know that we did not have a union there.

Senator SIMON. All right.

Senator KENNEDY. If the Senator would yield—are the wages comparable to what they are at the other plant?

Ms. SMITH. The wages are comparable to the job we perform; we get a fair wage for the job we do.

Senator KENNEDY. But I mean to the plant that Senator Simon referred to.

Ms. SMITH. You cannot compare the two plants, because one is a manufacturing assembly plant, and the other requires specialized skills to tool out, milling, or whatever you are doing. So you cannot compare apples and oranges.

Senator SIMON. But there is not a Ross Gear plant in Tennessee that is a union plant?

Mr. SKIBA. Senator, speaking in that regard, I guess we will have to get information back to you, because we are not in the same group or the same division; that is part of our steering and suspension group.

I am not personally familiar with the wage/benefit plans in any of the other Tennessee facilities, although we can certainly get that information for the record.

Senator SIMON. But since you are the same corporation and in the same State, you would have to be aware of whether that corporation in your State has a union plant somewhere else in that State.

Mr. SKIBA. I am not sure if there are unionized facilities or not in our steering and suspension group. I just do not know.

Senator SIMON. I have to say I am a little amazed at your answer, but I will assume you are telling me the truth.

Mr. SKIBA. The other thing that I will add on top of that, though, is that in the steering and suspension business, they are significantly different. We are an assembly facility, and basically the skills that we are looking for and the skills that are required are different. That is as much as I can say, but we will get that information for the record.

Senator SIMON. All right.

[Information referred to was not received by press time.]

Senator SIMON. Let me just add, Madam Chair, that if we are serious about moving ahead on this legislation—and I assume you are—I think we probably ought to, since this is one of the recommendations of the Dunlop Commission, have another hearing where we hear all of the recommendations and hear from John Dunlop as well, in another hearing about a much broader spectrum and not just this one recommendation.

I would just pass that along, and I thank you very much.

The CHAIRMAN. Thank you, Senator Simon.

I would just respond briefly to that. I think it is important. It is a very important issue, and on the second panel, I think there are some labor lawyers who can answer the question of legality, because one of the reasons for putting this legislation forward is because there is an uncertainty as to whether one is under the guidelines of the National Labor Relations Board and how it will be determined, and because of the Electromation decision, of course, this was all brought forward.

So it is important to understand it and all of the different ramifications, and I think Senator Pell's alternative on co-determination is important.

Senator Kennedy?

Senator KENNEDY. Thank you, Madam Chair. I apologize for being late, and I would like to have my statement included in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

Madam Chairman, I welcome this opportunity for the Committee to begin consideration of the Teamwork For Employees and Management Act.

This bill would effectively repeal one of the five prohibitions on employer unfair labor practices enacted in the 1935 National Labor Relations Act and reaffirmed in the 1947 and 1959 Labor Acts. Since 1959, this Committee has rarely so much as considered—let alone reported out—a bill containing such a significant change in the NLRA, and never without extensive and well-documented evidence of the need for such a change.

Given the significance of this proposal and its implications for national labor policy, it is important that this Committee give this proposal the deliberate consideration it deserves. This is a matter on which we need to have the considered views of the Administra-

tion, experts in the field who have studied this issue, and leaders of the business and labor communities.

The general premise of the TEAM ACT is one I share. If the United States is to succeed in the global marketplace, we must develop a new American workplace. As Labor Secretary Reich has said time and again, our working men and women are our most important asset and our only lasting source of competitive advantage. Finding effective means to develop the full potential of our work force and to fully engage the knowledge and talents of every working man and woman is a first priority.

But, contrary to S. 295's proponents, I do not believe that Section 8(a)(2) of the National Labor Relations Act stands as an impediment to developing a new and better workplace. The Act allows wide leeway for employers and employees to implement legitimate forms of employee involvement. The best proof is that such programs are spreading at a rapid pace under the current law.

This legislation is not needed to make teams lawful in the workplace. They are lawful today, and the National Labor Relations Board has so ruled. The NLRA also affirmatively encourages what experience has proven to be the most lasting and effective form of employee involvement: an equal partnership between management and labor, each acting through independent representatives of their own choosing.

What the labor law does not allow are illegitimate employee involvement schemes. It does not permit employer-created and controlled organizations with whom the employer deals on wages and working conditions. By authorizing these sham forms of employee involvement, S. 295 may satisfy the desire of many managers to maintain control over workplace decisions while creating the illusion that employees are "involved" in those decisions. But enactment of this legislation would not move us forward to the future. Rather than paving the way for a genuinely empowered work force, it would only perpetuate the failed, command-and-control management techniques of the past

Although described by its proponents as something new, the truth is that S. 295 is virtually identical to a proposal that was made and rejected by Congress in 1947, when the Taft-Hartley Act was enacted. Even in that Republican-controlled Congress, it was recognized as a proposal that went too far in the wrong direction.

At a time when our economic institutions find it increasingly difficult to distribute the rewards of work fairly—when productivity and profits are soaring while wages stagnate—we need to revitalize worker representation, not undermine it.

I am convinced that the record of this hearing—and those which I hope will follow—ultimately will demonstrate that S. 295 is a large step backward, a return to the days when company unions were prevalent and gave employers a convenient way to preserve their power and deny an independent voice for employees.

This is an extremely important issue for working families for the future of the nation's workplaces. look forward to these hearings and to working with my colleagues on the Committee to fairly address the important issues raised by this proposal.

Senator KENNEDY. First of all, I think the idea of working closely together and having a company or a corporation that values its em-

ployees is certainly a commendable concept and approach. It is something that I think we need to have much more of in our work force today.

One of the areas that we were looking at in the last Congress, for example, was occupational health and safety, and legislation had already been adopted in the State of Washington, Senator Gorton's State, involving teams working together to do something about safety, and they have had a remarkable record and a remarkable reduction in terms of reducing workmen's compensation claims and also insurance costs paid by companies and corporations. And it was interesting to me, as we were trying to move in a direction toward the team approach in the last Congress, the difficulty we had in getting Republicans and the business community to join in recognizing the importance of encouraging working partnerships and bringing employees into the decisionmaking process.

So this concept is certainly commendable, but I must say I join in wondering—and what we have heard this morning is impressive testimony—how any of this really violates the existing law; I do not see how it does. As legislators, we have an awful lot to do around here, and I am just wondering, given what we have heard here—and I have been listening to this testimony, and we have had a chance to go over the statements last evening—what your basis is for believing that these kinds of cooperative efforts would violate the law.

Mr. Skiba?

Mr. SKIBA. Again, not being a lawyer, I do not have a personal view on whether one activity is legal and another activity is not legal. I think that the thing that we know is that there is some question as to the interpretation of the law.

Senator KENNEDY. Well, from your own understanding, what do you understand as being the difficulty or that would threaten this kind of activity that we have heard about this morning?

Mr. SKIBA. The only knowledge I have is that there is some question in the National Labor Relations Act as to what extent team activities can be fully taken forward. That is as much as I know.

Senator KENNEDY. Well, as I understand, the National Labor Relations Board has specifically ruled that it is not a violation of 8(a)(2) for a company to delegate managerial or adjudicative functions such as hiring or deciding grievances to employees, or for employee teams to work together the way that these efforts have. If we are going to alter or change the existing law, then maybe there ought to be adjustments and changes. Of course, the Dunlop Commission did not recommend this particular alteration or change individually. The Commission spoke about the need for other general kinds of changes in terms of organizing rights in a modern world. And I think Senator Simon's point is enormously important. If we are going to get in to dealing with the substance of these kinds of alterations and changes in the National Labor Relations Act, I for one think that we ought to take a look at the series of recommendations that were made by the Dunlop Commission, and I think it is important that we do that and that we hear recommendations from Mr. Dunlop as well as from the other members of the commission.

But I think the idea of employees and management working together in a team effort to try to do something about increasing productivity, increasing competitiveness, as well as in the areas of safety, is something that is enormously important.

I recently went through a very impressive plant, an old plant up in Massachusetts for GE Engine, which is out in Lynn, MA. They produce the best jet engines in the world up there. And I spoke with both the management and the workers about the various innovations that they have had which have resulted in savings of tens of millions, hundreds of millions of dollars to the corporation. They have improved production, improved on-tine delivery and have improved the performance of those engines for the military and also for the civilians. So the idea of involving people together is something that I think is worthwhile.

Let me ask the panel—as I understand it, you are working in the areas of quality control and production. I do not know whether you get into safety issues as well—do you?

Ms. SMITH. Yes, we do.

Senator KENNEDY. You make recommendations, and you have been able to see how safety aspects have improved? I would be interested if you could give us information on that; you can submit it for the record or comment now, briefly.

Ms. SMITH. I can comment briefly now and just give you an overview.

Senator KENNEDY. Sure.

Ms. SMITH. We have a safety committee that we formed in our plant, and who is on this committee—we have a representative from our safety department, manufacturing technicians, people from all areas of the plant. People know who is on the safety committee, and if you have an ergonomic issue or something that you are concerned about, there is your forum right there to take it and get it resolved if you have been unsuccessful previously.

Senator KENNEDY. Maybe you could for the record supply how that has altered or changed, if you could, Mr. Skiba. Would you provide that?

Mr. SKIBA. Yes.

[Information referred to was not received by press time.]

Senator KENNEDY. Let me ask, are you able to raise other kinds of issues, for example, in terms of wages? Let us say you find out that you are able to make recommendations that really do make an important difference in terms of quality, in terms of productivity, in terms of delivery time and lowering costs. Do you have the ability to say, okay, we are also interested in seeing if some of those savings and profits have actually gotten down to the workers? How does that work?

Ms. SMITH. We are able to see that every year. We do not have to say that; we have someone looking out for our better interests. And this year, when it was time for our update meeting, plantwide there was a 5 percent raise that got passed along to those people who helped drive the changes and make the changes.

So yes, we are able to see the return without having to ask for it, because there is someone there who has already had that thought in the forefront.

Senator KENNEDY. But who is "they," the person who decides that you have done very well and you will get a bonus?

Ms. SMITH. Well, our accountants, of course. The accountants are the ones who are going to look at the numbers and see what we are making. And it is only common sense that if we save money, it is going to get passed along to us. So that is what encourages us to reduce our scrap and our waste because we want to be able to see that end return.

Senator KENNEDY. Well, you would certainly hope that that was the case, and as you say, wages have increased by 5 percent. You can understand that that is not always the case in every situation.

Ms. SMITH. And if not, then you can go somewhere else and get another job.

Senator KENNEDY. What is your unemployment rate down there?

Ms. SMITH. We have a very low turnover rate at our plant, as a matter of fact.

Ms. COWAN. Less than one percent.

Senator KENNEDY. Less than one percent per year?

Ms. COWAN. Yes.

Ms. SMITH. Yes, sir.

Senator KENNEDY. That is very low.

Ms. COWAN. You really need to come down and take a tour.

Senator KENNEDY. Yes, come on down; I will get our new Senate colleagues to give me a little walking tour.

Mr. KING. Senator, I would like to State that at Eastman, we do keep up with what we call our "success sharing," where it is calculated in our capital and return on assets, and those numbers are able to be reviewed all the way down to the lowest team member's level; you can track that all through the year and see how the input you have made is going to affect the overall company and what kind of payoff that will have back to you at the end of the year.

Senator KENNEDY. Has anyone complained about your organizing or setting up these teams? Has anybody said that what you are doing is illegal?

Mr. KING. I have not heard anything about it being illegal. I wish I knew enough about it that I could share if it were. I guess what scares me to death and the reason why we are here is that we have seen such dramatic changes that it has made in the company, and it has been an actual cultural change and something that has changed dramatically in the last 10 years, and I look for it to change even more dramatically in the future as the teams mature even more and take on more ownership.

I would hate to think that we were being conservative because of legislation that was holding us back.

Senator KENNEDY. What does the company do in terms of training programs? Do they give you additional training to move on through and upgrade your skills?

Mr. KING. Not only do we have the technical type training that helps you with problem-solving and that kind of training as far as teamwork, but you have interpersonal training on how to communicate, how to listen, how to serve in different leadership roles and be an engager and have input into the team. So there is a lot of training that is delivered to all employees.

Senator KENNEDY. Mr. Skiba, if you could, could you tell us or submit for the record what you have as continuing training programs for upgrading the skills of the workers? I would be interested in that.

Mr. SKIBA. We will provide that. I will add, though, that in our facility we have a special organizational function that is set up strictly for training. We have a large training resource center where we have not only information but periodicals, videos—we use videos extensively in our training—and we have training coordinators who are specifically assigned to a business unit to work with that group as they determine their own training needs and develop material to put training through.

So we use training materials extensively in our facility, and we will provide some information for the record on that.

Senator KENNEDY. Thank you.

[Information referred to was not received by press time.]

The CHAIRMAN. Mr. Albertson spoke earlier, and I would like him just to comment on what they did to assist him.

Senator KENNEDY. Good.

Mr. ALBERTSON. Well, first, when I started out, I did not have my GED, so I went to school and received my GED. I went to work for TRW, and TRW is really supportive of learning. Since then, I have received certificates in Lotus, WordPerfect, Network and Paradox. I am also attending Nashville Tech now in maintenance, seeking my associate's degree.

So these companies are really important to people like me who are not privileged. So I want to thank the company.

Senator KENNEDY. So do you get sort of a skills standard degree? You have gone through the training program, and you specialize in a particular area, and you have completed that program; is that correct?

Mr. ALBERTSON. Yes.

Senator KENNEDY. And then you have something that you can take with you, I imagine.

Mr. ALBERTSON. Yes.

Senator KENNEDY. I mean, if you left and went to another State, you would be able to say you have completed this program, and you have these kinds of skills, and any employer—this is a related issue that we have been looking at in the committee in terms of the development of recognized skill standards, which I think is a superb program, and I think you deserve a lot of credit for doing it.

Mr. ALBERTSON. Yes.

Senator KENNEDY. Do they give you time off to be able to get the training?

Mr. ALBERTSON. If I need it off, they will provide the time for your schooling.

Senator KENNEDY. Good. That is certainly impressive.

Thank you, Madam Chairman.

The CHAIRMAN. Senator Wellstone?

Senator WELLSTONE. Thank you, Madam Chair.

Actually, since we have other panels, and I had to come in late because of another committee—I keep going back and forth—I will just wait and maybe submit some written questions to you all.

Thank you for being here, and I apologize for not having had the opportunity to hear you.

The CHAIRMAN. Thank you. I would just like to say again this has been a very impressive panel, and we appreciate everyone coming.

There have been a lot of questions about whether indeed the TRW facility or the Eastman facility are operating legally, and evidently they are—but this is the very reason why I introduced the legislation I did in the last Congress, before the Dunlop Commission was even set up, because of the Electromation decision, which cast real doubt on whether it was legal or not under 8(a)(2). There are a number of cases pending right now regarding employee involvement cases in both union and nonunion settings. There is one here that found that a nurses' committee did not violate; others found that a safety committee did violate, a transportation safety committee did violate.

So I think it is the uncertainty that is there that hopefully with the next panel, which does include some labor lawyers, maybe we can understand a bit better. But I think it is a confusion that has caused some of the problems.

Ms. Cowan, I will say that I bet you are a good tour guide through the facility, and we look forward, I hope, to someday visiting both plants.

Thank you very much for coming.

It is a pleasure to welcome the second panel, and again, starting from left to right, Mr. Chester McCammon, a team member who works at Universal Dynamics in Woodbridge, VA; Mr. Hal Coxson, an employment lawyer representing a coalition of large and small employers who support the TEAM Act legislation; Mr. David Silberman, director of AFL-CIO's Task Force on Labor Law; and Ms. Berna Price, an employee at the Electromation Company in Indiana.

I appreciate everybody coming this morning. Mr. McCammon, we will start with you.

STATEMENTS OF CHESTER McCAMMON, TEAM MEMBER, UNIVERSAL DYNAMICS CORP., WOODBRIDGE, VA; HAROLD P. COXSON, COLEMAN, COXSON, PENELLO, FOGLEMAN & COWAN, WASHINGTON, DC; DAVID M. SILBERMAN, DIRECTOR, AFL-CIO TASK FORCE ON LABOR LAW, WASHINGTON, DC; AND BERNA PRICE, ELECTROMATION, INC., ELKHART, IN

Mr. MCCAMMON. Senator Kassebaum and members of the committee, my name is Chester McCammon. I work for Universal Dynamics out of Woodbridge, VA. We produce and manufacture conveying and drying equipment for the plastics industry. The span of our manufacturing crosses from electronics design and manufacturing of digital components to the actual fabrication and welding of large mechanical assemblies.

I want to thank you for this opportunity to come before the committee and testify, and to give my opinions on employee involvement and how it affects me and my fellow employees at Universal Dynamics.

For your information, over the last 25 years, I have worked out of five different union locals, including boilermakers, teamsters,

and maritime unions. I have worked for corporations and companies with as few as ten employees and as many as 1,000. I have functioned as a laborer, a craftsman, a supervisor, a team leader, a union steward, and even owner of a small business—I am also a little nervous.

The CHAIRMAN. You are doing fine.

Mr. MCCAMMON. At Universal Dynamics, the meaning of employee involvement is basically freedom of choice. You have the option to choose the degree of involvement to which you wish to participate. You have the freedom to be involved in your personal success in the company and in the workplace. You have the freedom to be involved in the quality of the environment in which you work as well as your environment at home and in the decisionmaking process that affects that.

The green sheet system that we have is one of the mainstays of our employee involvement. This system was brought into effect about 3 or 4 years ago, right after I got to the company. It was so successful that it has been revised three or four times; we now have three different sheets, three different colors, each one representing a different level.

We have computer terminals in the workplace now where employees have the ability to pull up drawings and to make redline decision changes on their own. These are reviewed and updated on a regular basis—a daily basis.

Universal Dynamics operates as one large team, with a dozen or more subservient teams. This allows individual employees to cross all boundaries, all departmental boundaries, and go directly to the person who might best help them to solve a problem that has arisen, or help them find a solution to a problem.

The green sheet system in itself has no limitations as to what the problem subject matter can be. An individual can participate more by filling out more sheets and by involving himself more, or by filling out less.

As a team leader, one of the basic concepts is that I serve my team. We use the vendor/customer relationship philosophy. I am the vendor for my team; they are my customer, and I seek to make them happy. I do this by serving them. Ways that I serve them include eliminating obstacles and problems so that they can better and more efficiently do their jobs.

I also serve them by letting them know when they are in violation of company policy or when they are adversely affecting the function of the team. I further serve them by encouraging and helping in education and cross-training. Some of our educational and cross-training programs include JIT, or just-in-time manufacturing, focused factory production, total quality control, and problem-solving. We currently have classes going on at a company-wide level in these areas.

It is important to realize that the freedom that is exercised by me and my fellow employees by being involved in the decisionmaking process that affects us, economically as well as environmentally, gives us a much stronger sense of self-worth; it gives us much more confidence, and it gives us much more self-reliance. I will cite one small case that just popped up the other day.

We had a deficiency in one of our products, a warping in a valve. I went directly to the welder who was handling it. We informed the team leader merely as a courtesy, and he and I carried out the problem and solution, which took over a week of trial and error. This gentleman would leave his area, come over and drag me back to show me what he had done to improve this product. And you have to understand, I have been in the work force for a long time, and I have been a member of a suppressed work force for a number of years; so this is amazing to get this type of reaction out of other team members and off of other teams.

In closing, I would like everybody to understand that I do not believe that there is any silver bullet solution to the problem we have with employee involvement. However, I do believe that this particular piece of legislation is on target. But if we do not take a shot at it, we will never know.

Thank you.

The CHAIRMAN. Thank you very much, Mr. McCammon.

[The prepared statement of Mr. McCammon may be found in the appendix.]

The CHAIRMAN. Mr. Coxson?

Mr. COXSON. Thank you, Madam Chairman.

I appear before you today as a representative of the TEAM Coalition, which is a newly organized group of companies, trade associations and workplace teams that support the principle of employee involvement and worker participation in decisionmaking.

Specifically, we support legislation such as the Teamwork for Employees and Management Act, which would remove outmoded, highly technical, and I believe unintended legal and Federal labor law barriers from the 1930's that jeopardize today's cooperative employer-employee relationships in tens of thousands of American workplaces.

You heard this morning some very powerful testimony from teams and members of teams from both large and small companies. There was similar testimony from other companies yesterday in the House. They have described various forms of employee involvement and worker participation programs.

Clearly, there is no "one size fits all" approach to workplace committees, and it is an evolutionary process. Flexibility is essential to allow employers and employees to construct a program which makes the most sense in the context of their particular workplace, which I think is a distinction from the CASHRA legislation introduced in previous sessions of Congress.

I would like to use my time simply to rebut the arguments made by opponents of the legislation. First, that there are few 8(a)(2) unfair labor practice decisions, and therefore the legislation is not needed, and why is there such a cause for concern. The second is that the legislation is a smokescreen to hide ulterior motives of employers, which is to return to the 1930's-style sham union abuses, and that the bill is too broadly drafted. And third, let the labor board decide this; there is no need for legislation.

Response to number one, which is the few cases, the board cases recently decided were pending against some of the best-known and most highly respected companies, such as DuPont, Polaroid, and there was a hearing yesterday at the labor board involving the Po-

laroid case, and the Donnelly Company, which has consistently been on the list of 100 best companies to work for, sends a chilling effect throughout the rest of industry and on all employee involvement programs.

I note that the Donnelly charges were dismissed on February 2, shortly before these hearings, which strikes me as politically opportune timing, but they were dismissed not on their merits, but rather on procedural grounds that they were not filed by an employee or an agent of an employee, that they were not based on independent knowledge, but from the testimony of the Donnelly Corporation before the Dunlop Commission. Therefore, the question as to whether their programs are legal or not still remains undecided.

There are legal uncertainties created as a result of this, and I refer the committee to statements made by former general counsel of the labor board, John Irving and Rosemary Collyer, and the extensive debates before the American Bar Association as to what types of programs are legal and what are not legal, as a result of the Electromation decision. There are many lawyers around the country who are unclear on that and who are deciding on that, and if the lawyers are unclear, you can imagine how the business people are unclear, and especially smaller employers.

The fact that few cases have been brought does not make the conduct any less a violation, if indeed the facts demonstrate it is a violation. Speeding is no less unlawful simply because the driver is not stopped. And I cannot ethically counsel clients that employee involvement programs are in violation, but do not worry because you will not get caught, so go ahead and do it. You can never counsel ethically clients to violate the law.

One of the problems is that the case law, the cases are usually long, detailed and somewhat complicated cases involving entirely fact-driven issues. For example, the question of unlawful domination or assistance often is determined by such factual minutiae as whether it is the employer who scheduled the meetings, whether the meetings take place on company facilities, or whether the employer's equipment, such as typewriters or copying machines, is used.

It is the view of the current NLRB chairman, for example, Chairman Gould, as expressed in his book, "Agenda for Reform," that such factors "make repeal of 8(a)(2) a desirable objective," because as he ominously notes in his book, "in truth, some of the scenarios arising in new cooperative relationships will not survive that provision." That messages sends to employers and workers a chilling effect on future decisions of the National Labor Relations Board, especially now that Professor Gould chairs the NLRB. He personally favors amendment rather than repeal, but amendment along the lines, I believe, of the current Senate bill. And he is joined in that call for repeal by other noted labor law professors such as Harvard's Paul Weiler, who is hardly a spokesman for management.

The Dunlop Commission concurs in the need for reform, and Secretary Reich has stated that he will take a closer look at recommending amending the Act if Electromation serves a chilling effect. I submit that the chill is here and that Secretary Reich take a closer look.

I would just add one other point on whether this law is needed, and that is if the legislation is not needed, if all of these employee involvement programs are presumptively legal, why did the sponsors of last year's COSHRA bill find it necessary to amend the National Labor Relations Act to make those joint labor-management health and safety committees legal?

In response to number two, the smokescreen argument, return to the 1930's, the specific language of the bill—which I will not read for purposes of saving time—makes clear, we believe, that this is specifically not designed to permit company-dominated unions. It is not the intent of the sponsors, and it is not our intent.

There are some hysterical claims of opponents which are simply not factually and legally supportable in this case, and I refer to the statement this morning which I just received from Mr. Silberman, in which he states that S. 295 applies not only to unorganized workplaces but also to unionized workplaces, and the bill therefore would permit employers to bypass the chosen union representatives and deal directly with the employees. That is in fact an independent 8(a)(5) violation as evidenced in the DuPont case. This bill would not do that. This bill does not touch that section at all.

I will get to response, hopefully, to the other arguments—I know my time has elapsed—perhaps in question and answers.

Thank you.

The CHAIRMAN. Thank you, Mr. Coxson.

[The prepared statement of Mr. Coxson may be found in the appendix.]

The CHAIRMAN. Mr. Silberman?

Mr. SILBERMAN. Thank you, Madam Chairman.

S. 295 raises large issues of labor policy on which the AFL-CIO, of course, has strongly-held views. It is our hope that at the appropriate time, President Kirkland will be afforded the opportunity to discuss those issues with you as you proceed with your deliberations. But this morning, I want to thank you for this opportunity to participate in this panel discussion.

The stated purposes of this legislation are to "protect legitimate employee involvement structures" and at the same time to "preserve existing protections against deceptive employer practices." So two questions are really raised. The first is does the current law threaten existing, legitimate employee involvement structures, and second, does the proposal maintain the needed protections. Let me deal with each of those questions.

As you know, section 8(a)(2) is not an across-the-board prohibition on employee involvement. All that it says is that employers shall not be permitted to dominate a labor organization. Put differently, what the law does is draw a line between the legitimate and the illegitimate, by prohibiting one and only one form of employee involvement, and that is involving employees in an organization which is dominated by the employer and which deals with the employer with respect to issues of wages and working conditions. All else falls outside the reach of 8(a)(2).

Of particular importance here, nothing in section 8(a)(2) regulates work teams or any other form of work organization. The labor board specifically so held back in 1977 in the General Foods case, and since then there has not been a single case to so much as ques-

tion the legality of work teams. Indeed, on two occasions of which I am aware when charges were filed the general counsel, the general counsel refused to issue a complaint, saying that work teams are plainly lawful.

So that all of the impressive-sounding things you heard about this morning are permitted by existing case law.

The Electromation case, which is cited here as proof that there is something wrong with the law, actually proves quite the opposite.

With me this morning, sitting next to me, quaking in her boots, is Berna Price, an employee from the Electromation plant, and in a few minutes, you will get to hear directly from her what that case was really all about. But if you will permit me a sneak preview, that was not a case that involved work teams or anything like that. Berna and her friend Diane Vernet, who is with her, said to me as they were listening that they would like to work at a plant like TRW; but that is not what that case was about. It was about a company that cut benefits, that found the employees were unhappy and that decided they had better do something about that, and created some ad hoc action committees. Management decided what those committees would discuss, management chose the people to sit on those committees, and management decided when the committees would meet and how they would function. And when the employees tried to form their own union, management pitted those committees against the union.

So that despite all the hype, the truth is, as the board carefully pointed out in its decision, at the 7th Circuit carefully pointed out in its decision, and as some management attorneys have conceded, that Electromation has nothing to do with work teams or quality circles or any other legitimate employee involvement.

What was at issue there, and all that was at issue there, was an old-fashioned company union.

That brings me to the second point. S. 295 would not continue the necessary protections against unfair employer practices. It would allow employers to do precisely and exactly what employers were doing in the 1920's and 1930's, and precisely what Electromation itself did—to "involve employees in ways that do not threaten management prerogatives by creating employer-controlled and dominated employee organizations."

And S. 295, despite what Mr. Coxson has to say, would likewise permit employers to do precisely what the employer did in the DuPont case. DuPont is a case where there was a union. The union went to the company and said let us create a joint labor-management safety committee, and the employer said, "No, we do not want to do that," and then the employer went out and set up some safety committees, and the employer chose the employees to be on those safety committees, and they could talk about whatever they wanted in those committees, but not in anything with the union. S. 295 would allow that kind of practice to continue as well.

By its terms, S. 295 says that employers, union and nonunion alike, can "establish, assist and maintain employee organization to deal with terms and conditions of employment." In practical terms, what that means is an employer can create an employee organization which then exists at management's sufferance. The employer

can write the bylaws, determine the operating procedures, establish the mission—the employer can even choose the employee representatives, and then the employer can deal with this management-created and controlled entity with respect to wages, fringe benefits, any subject that would ordinarily be a bargaining subject.

The only limitation stated in the bill is that the employer cannot sign a written agreement with this entity that it has created.

So that in sum what S. 295 would do would be to deprive employees, union and nonunion alike, of the right that they now have today—their assurance, their guarantee that they will have independent representation if they are going to deal with their employer with respect to terms and conditions of employment. It is our view that such employer-controlled employee representation stands in the way of authentic worker voice and in the way of legitimate employee involvement. Such employer control, we submit, is in truth and should remain in law an unfair labor practice.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Silberman.

[The prepared statement of Mr. Silberman may be found in the appendix.]

The CHAIRMAN. Ms. Price?

Ms. PRICE. Hi. My name is Berna Price. I am a member of the Teamsters Local 364 out of Elkhart, IN.

I have worked at Electromation for 16 years. I am not a professor, and I am not even a lawyer. I am a worker with first-hand experience about these employee committees——

Like the commercial says, "Been there, done that."

When management cut our pay and benefits 6 years ago, a lot of us talked about organizing a union. We passed around a petition to protest the cuts, and 68 people signed it. That is when management set up the employee committees, because it looked like we were going to have our own organization, and Electromation did not want that.

Electromation picked the people who could be on the committees, and they set the agenda for what the committees would talk about. That is like saying you can go into a grocery store, but the clerk is going to pick out what you are going to buy. All of a sudden, management wanted to know what we thought about things.

A lot of us were suspicious because Electromation never cared what we thought before, and they did not have these committees at any of their other plants.

Sure enough, the committee meetings were just talk. For example, if you complained about something like a machine needing a guard on it, they just did not invite you to the meetings anymore.

The committees were a way for the company to pretend to be on the side of the workers, while making sure we had no protection and no voice.

The company kept threatening that if we voted for a union, they would shut the plant. Nobody wanted that to happen, so a majority of the workers voted against the union.

Then, the Government agreed with us that the committees were set up to discourage us from organizing a union, and the labor board ordered another election. By then, most people realized that

they would not have a real voice without a union, and we won that vote.

Our company could have cooperated with us by accepting the fact that we wanted a union, our own representatives that we had elected. But when some of the same women who they had put on the action committees sat across the table as union representatives, management no longer wanted to cooperate with us.

Participation was fine, as long as we women "knew our place." But when we wanted our own voice, not something called by management, then we were treated like we were out of line.

We proceed to negotiate our first contract. We got raises we would never have gotten without the union. We got the company to make temporaries permanent workers after 90 days, and we got some of our safety problems taken care of.

A lot of the workers had suggestions about how to improve quality and efficiency. Before, workers were afraid to say anything; but now, workers know they can take someone from the union with them.

Sometimes, management takes our suggestions, but they do not do some of the major things that could make the plant more productive. For example, turnover hurts quality and efficiency. We are constantly having to train new people because many workers who have gained some experience go off to look for better jobs. But management does not want to raise wages and benefits in order to keep their employees. Management's first priority is not to invest in people; it is to make profits for themselves.

To have decent wages, health benefits, and pensions, working people need our own organizations. These are not things that management will ever give us on their own. I do not want to see the law changed. If we did not have the law, we still would not have our voice.

Action committees like they set up at our plant are not the way to have cooperation with management. Employee committees do not give workers a democratic right to pick our own representatives. Employee committees do not protect workers who speak out and tell the truth about problems in the plant. Employee committees do not give you anywhere to turn if management refuses to solve those problems.

If Congress wants to help working people, you should be making it easier for us to have unions, not harder. You should make it so companies cannot threaten and scare people who want to pick their own representatives to negotiate with management. You should protect democracy on the job. That is the American way.

Thank you—but I would like to add one thing that is not in my speech. We are just a small factory, and we have only approximately 100 people, so we are not as large as some of these other factories. I would just like for you to keep that in mind.

Thank you.

The CHAIRMAN. Thank you very much, Ms. Price.

Mr. McCammon, I think I would like to start with you, because you have been and maybe still are a union member.

Mr. MCCAMMON. I am not at this time.

The CHAIRMAN. But you have been?

Mr. MCCAMMON. Yes, I have been.

The CHAIRMAN. Do you think it makes any difference whether the setting is union or nonunion as far as being able to get the concept of employee teams working?

Mr. MCCAMMON. I think it can work in both settings. The responsibility for the company to cooperate with the management is also the same responsibility that the union has. The union services the employees as a company, which makes them the vendor for the employee. If this relationship takes place, if the individual local makes an effort, and the spirit of cooperation is there, then it can exist in both settings without a problem.

The CHAIRMAN. Is there a risk, as has been pointed out in the Electromation situation, I guess, that the employer really set up a sham employee committee—is that what you were saying, Ms. Price——

Ms. PRICE. Yes.

The CHAIRMAN [continuing]. And that is was not effective, and the employees felt that they had no effective means of communicating their grievances. And you are a relatively small——

Mr. MCCAMMON. Right; we only have 200 employees.

The CHAIRMAN. How do you get around that concern, because that is obviously one you hear, that it is often an attempt by employers to set up a sort of sham union.

Mr. MCCAMMON. The difficult part of this is that people are not realizing that these are human beings, and there are a lot of philosophical ideas that have to enter into it. The company has to take the first step. They are the ones who have to move toward it.

Personally, I actually resisted it quite a bit because I did not think the company was sincere, and I had no way of gauging their sincerity because they could fall back and say the law does not allow me to do it, and I have no way of knowing whether the law does or does not, and they could use that as an excuse. So I had no way of gauging their sincerity, and the only thing I could do was resist it and resist it, and then if they showed me that they had enough interest to keep going at it, then I went ahead and started cooperating with them, and the program started evolving.

Our green sheet system—and I mention this because it is the heart and core of our employee involvement system—allows any employee to State any problem, be it on a personal level, communicative level, production level, safety, economics—anything.

The CHAIRMAN. Let me ask—to the management?

Mr. MCCAMMON. Yes, directly—it is logged in, it is numbered, it is recorded on a computer; it goes through management.

The CHAIRMAN. And there is no fear of retribution?

Mr. MCCAMMON. No, ma'am.

The CHAIRMAN. Ms. Price, in your case evidently, employees did not feel that they could really register concerns that they had and that they would be considered at all; is that the case?

Ms. PRICE. Oh, they got heard; the company would listen to them, but that is as far as it went. They would not do anything about it. They would let the employees express their feelings, but they would not go forward and fix the problem.

The CHAIRMAN. And so it was not until the union became involved that you felt you had a voice; is that what you are saying?

Ms. PRICE. Yes, because they know we have someone to back us up now, and if we do not get it solved, that we can find somebody else who will go in and help us to solve it.

The CHAIRMAN. And how did they help you solve it?

Ms. PRICE. They would call the human resource person and talk to them about it and get the ball rolling across town, because we are five small plants.

The CHAIRMAN. But has it been resolved?

Ms. PRICE. Oh, yes. We get along a lot better now since we are unionized than we did before.

The CHAIRMAN. Well, in some ways I guess it is unfortunate that the employees themselves did not really have a voice, and I think that is what we were trying to address—not to cut out the unions, but the ability, as we heard from those who testified on the first panel, of employee groups that are working.

Now, as I have heard from some of my friends in the unions in Kansas, you are assuming that every employer is going to be a good employer, and of course, that is not always the case.

But Mr. Silberman, I would just like to suggest that when you say we are violating the law, we really very carefully delineated—and I could let the lawyers answer this—section 4 of the TEAM bill says that "nothing in the amendment made by section 3 shall be construed as affecting employee rights and responsibilities under the National Labor Relations Act, other than those contained in section 8(a)(2) of such Act."

So I do not know that I quite understand how you believe this is undermining in any way the union or labor law.

Mr. SILBERMAN. Senator Kassebaum, I think you have to take it in two steps. Let us first talk about a workplace where there is not presently a union. In that place, section 8(a)(2) was put in the law precisely because Congress understood that if you allowed an employer to create employee organizations that the employer controlled and allowed the employer to deal with those kinds of organizations, that that would interfere with the employees' ability to exercise their rights to democratic representation.

So that if you essentially take section 8(a)(2) out of the Act, which is what this bill effectively does, in the unorganized workplace, you prevent workers from having the democratic voice.

In the unionized workplace where you already have a union, what this bill says is that the employer can create another organization that is not the union. The DuPont case, as I indicated, is the classic example, and I take it one of the purposes of this bill is to permit what the board held to be illegal in DuPont. In DuPont, the union came to the employers and said let us have a joint labor-management safety committee. You, management, will appoint the management representatives; we as the elected representative of the employees will choose the union representatives, and we will meet together to discuss safety matters.

The company said, no, we do not want to do that. Then the company went around and created safety committees, and the company went around and picked employees and put them on the safety committee, and the company dealt with these safety committees and undermined the union. The message to the employees was if you want to get something done about safety, do not talk to the

union, because the company will not deal with the union. And the broader message to the employees was the company does not want this union. So that in that situation, the bill would undermine unions even though I recognize that, of course, you do not change anything in the Act other than section 8(a)(2).

Another and shorter way to say that is that section 8(a)(2) is a core building block; it was the essence of this law. And to take that out, a lot falls down with it.

Mr. COXSON. Senator, if I could just respond to that briefly.

The CHAIRMAN. Mr. Coxson?

Mr. COXSON. I submit that that would still be a violation of 8(a)(5) of the National Labor Relations Act, which prohibits employers from dealing directly with employees when there is a collective bargaining agreement and exclusive representation.

So that while it may not have been an 8(a)(2) violation if this legislation were to pass, it would be an 8(a)(5) violation.

The CHAIRMAN. Wouldn't that be true, Mr. Silberman?

Mr. SILBERMAN. Two things. First, my understanding of what the sponsors and what this legislation was intended to do was to overturn the result in the DuPont case. I believe that if Congress passed this law, the board and the courts would then have to reconcile—on the one hand, this says you can do this in a nonunion workplace.

It is interesting to note, Senator Kassebaum, as I note in my written statement, that in 1947, Congress had before it a bill very similar to this bill. It passed the House. Senator Taft felt it went too far, and it was rejected by the Senate. But that bill expressly said that we were only talking about nonunion workplaces and that we were not giving any freedoms for employers to create rival entities in a unionized workplace.

This bill takes precisely the opposite approach, and I think the end result would be the courts would say that we have to somehow reconcile this bill with current law, and the conclusion would be that the employer could do this—they might have to deal with the union first and get to an impasse before they do it, but ultimately, this bill says that the nonunion employer can create entities without dealing with the union.

The CHAIRMAN. Well, I do not see that at all, but my time is up. I would just say that DuPont did not enter into this at all. I got interested with the Electromation decision because I did think with that decision, there was confusion about what would or would not be legal. And going back to 1947—I did not even know about the legislation in 1947—but that is an example of where I think both sides, management as well as labor, are fearful of trying something different for a different time. And that has been my desire, to try to find something that will help us work together in a better fashion.

Mr. SILBERMAN. If I may, Senator, certainly it is reassuring to know that the intent is not to deal with the kind of DuPont situation. But in terms of your further remark, our concern is that what we are talking about here is not something that is new for a new time; it is something that is very old. It is something no different at all than what was done in the 1920's and 1930's. There are lots of great innovations taking place. You have heard about some of

them today. The labor movement has been behind many of them. We are quite open to all of those. What we are trying to do is prevent us from returning to some old, tried and discredited methods, which we fear is what would happen with this bill.

The CHAIRMAN. And I do not want to do that, either.

Senator Kennedy?

Senator KENNEDY. Thank you, Madam Chairman.

I think the last exchange summarizes it. We are not discounting the possibility of facing new situations and trying to deal with them in a way that will protect the interests of the workers and enhance our competitiveness; but we do not have to necessarily relearn the lessons of history in terms of what would happen if there were not the kinds of protections that are now out there.

Could you tell us, Mr. Coxson, whom you are representing, anyway?

Mr. COXSON. I am here representing a new coalition that has just been formed. It is called the TEAM Coalition, and it is only a couple of weeks in existence, and it consists of corporations, trade associations, and work teams.

Senator KENNEDY. Could you tell us who they are?

Mr. COXSON. Well, some of the people who are here this morning and were testifying yesterday on the House side——

Senator KENNEDY. Well, can't you give me a list of the people that you are representing?

Mr. COXSON. I will provide you a list, Senator—I do not have one with me—but for example——

Senator KENNEDY. You cannot give me a list of whom you are representing here today?

Mr. COXSON. Senator, this coalition was just kicked off yesterday—last week——

Senator KENNEDY. Yesterday?

Mr. COXSON. No, not yesterday. Last week, Senator. And I will be happy to provide you with a list, but it includes associations such as the National Association of Manufacturers, the National Federation of Independent Business, the U.S. Chamber of Commerce——

Senator KENNEDY. Well, are you speaking for the NAM now?

Mr. COXSON. I am speaking as a representative of the coalition. I am not speaking directly for NAM, no.

Senator KENNEDY. Because the NAM as I understood told the Dunlop Commission that it was premature to recommend changes in 8(a)(2) and stated that they were prepared to wait and see. I mean, I think we have got to know whom you are representing, if you are representing the NAM and saying that they are part of the coalition you are speaking for, when they have given testimony that conflicts with what you have testified to here. I am just trying to find out exactly whom you are representing.

Mr. COXSON. Well, Senator, I am part of a coalition——

Senator KENNEDY. Are you familiar with the NAM testimony before the Dunlop commission?

Mr. COXSON. Yes, Senator, I am. Yes, Senator, I am.

Senator KENNEDY. And are you representing them today? Have they changed their position?

Mr. COXSON. I think their position perhaps has changed in light of recent developments in the political world as well as the fact that the case law continues to evolve, which adds more confusion and not less confusion to the law.

Senator KENNEDY. Well, so you are representing that the NAM's position, then, is no longer relevant in terms of where they were when they testified before the Dunlop Commission?

Mr. COXSON. Senator, I am representing the NAM's position as part of a coalition; and they are part of that coalition, and they believe there is now a need for a change in the law. And I would concur in that, Senator. I think that the answer is not now to simply let the NLRB change its mind through decisions and rulemaking, as Doug Fraser suggested in dissent to the Dunlop Commission, because I think that that section of the law is based solely on the congressional dictates and legislative history of the 1930's, and times have changed.

Senator KENNEDY. You point out that the purpose of the bill is to protect employee participation and rights in the workplace. Since you favor employee participation, would you support including language requiring elections by the workers to elect their employee representatives on the committees?

Mr. COXSON. Senator, I would not, for this reason. I think you heard the testimony this morning about a number of different types of teams. There are literally hundreds, if not thousands, of types of teams across the country. I think it should be left up to the individual workers in those teams as to whether or not they want to be elected, be appointed, be designated. I do not think there is a "one size fits all" solution to this issue.

Senator KENNEDY. We are not talking about one size nationwide. We are talking about in a particular work force and work site, that the workers in that particular work site ought to be able to make a judgment and a decision about whom they want to be part of the team that is going to be working on those work site conditions, whether those be safety, or whether they be quality, or other factors. Are you for their being able to elect their own people to serve on these teams?

Mr. COXSON. Senator, as you heard in the testimony this morning, some of those teams already do elect their representatives, so I would certainly not oppose that, but I do not think it should be enacted into legislation that all teams must be elected.

Mr. MCCAMMON. I may be able to shed some light on this.

Senator KENNEDY. OK.

Mr. MCCAMMON. I am a team leader, and I was not elected by my team members. I came from a completely different part of the plant. The team leader who was there no longer wanted the job, and the company, working with him, took several weeks to find him a desirable position that he wanted, because he no longer wanted to be a team leader.

I was chosen to be a team leader based primarily on my problem-solving skills and my communication capability. So I moved out of one area into an area that I was totally unfamiliar with from the standpoint of actual production, and I took over with my team. We did not alter the structure. We have already made some improvements in the work area, and I have not received any resistance.

If there were something in place that made it only possible for them to have a team leader that they elected, I would not be there, and the improvements that they have now would not exist, and our team would not exist.

Senator KENNEDY. Well, the company was able to get a team leader in Ms. Price's company as well. They were able to select the employees on the committee, but they did not represent the other employees. So the committee members were selected, but they did just the opposite and shortchanged the workers in Ms. Price's situation, where they put people in there who were not representing them. Where is the fairness in that?

Mr. MCCAMMON. It is not fair.

Senator KENNEDY. Well, that is the point I am trying to make.

Mr. MCCAMMON. I understand, but out there in the real world, there is no——

Senator KENNEDY. You do not think Ms. Price is in the real world?

Mr. MCCAMMON. Senator, I am trying to explain to you that I have experienced the same thing she has, and I have been discriminated against for what I thought were unjust and unreasonable conditions. However, the law could not enforce or provide any protection for me, either in this nonunion setting or in some cases, in union settings. It is up to the individuals who are in an individual group for this to evolve. It has to be a natural evolution. It is not going to exist everywhere. If we limit it too much, it will not. Our system has evolved so rapidly that we have already changed the employee involvement system four and five times.

Senator KENNEDY. Well, I want to point out that we heard a very good panel earlier in the day that had impressive cooperative activities that, just looking at them, did not appear to me to be either challenged or in violation of the existing law. We have all been around here long enough to say that we really do not intend the law to do this; we have to take a look at what the law really says, what those changes are and what the real implications are.

My time is up, but I would just end by asking Mr. Silberman, if this recommendation that is before us now were to go in, what are your greatest concerns about what that would mean for workers' rights in this country?

Mr. SILBERMAN. Senator Kennedy, I think my greatest concern is that workers will lose the assurance that the present law gives them that when they deal with management about their wages and their benefits and their terms of employment, they have representatives whom they select, who are accountable to them and who are accountable only to them. And I think Electromation is very helpful in drawing the contrast brilliantly. Before and under this bill, what would be allowed—management decided what issues would be discussed. There were some issues that the workers were very concerned about at the Electromation plant, but they were not the subject of the action committees because management did not want to discus those subjects. Management decided whom would be on those committees, when they would meet and how they would function.

Once those committees were gotten rid of under the existing law, the workers were able to vote as to whether they wanted to have

a union, and they elected a union. They then elected a negotiating committee with leaders they chose. They then met together and decided what proposals they wanted to make to management, and they voted as a work force as to here are the proposals we want.

They went to management, worked out an agreement, and they came back, and the workers voted to accept that contract.

That is what democracy is all about. The present law does not force that on people, but it forecloses undemocratic alternatives. And my greatest fear is that this bill would open up the undemocratic alternatives and take away from workers the assurance that if they are going to deal with these subjects, it will be done in a democratic fashion.

Mr. COXSON. Senator, I would just like to add one point to that. I think Mr. Silberman makes a good case, that if an employer begins down this road and empowers workers and provides for teams such as we heard described earlier, the employer, if it is not sincere, or if it is a sham, or if it later pulls the plug on that, does so at the employer's peril, because I can think of no greater union organizing tool than where an employer is insincere in setting up these teams, and I think the case is demonstrated in Electromation.

However, it is my understanding that there was subsequently, I think, a decertification procedure involved with Electromation, so apparently not every worker was happy with the union representation.

And I would just also comment, because there was some question as to whether or not some of the types of teams described earlier are in fact in violation of the National Labor Relations Act—I would say that in some cases, that is a close call, because the types of cross-functional work teams that were described, the types of decisions involving terms and conditions of employment that some of the teams are involved in, really are in a gray area, and perhaps would be decided by the National Labor Relations Board one way or the other. But I cannot predict that right now. I think that the law is so uncertain in this area that that is why we need a legislative clarification.

Senator KENNEDY. Madam Chairman, my time is up, but the decertification issue was raised. Could Ms. Price just respond to that and clarify it?

Ms. PRICE. we did have a decertification a year ago December, but we went to a vote on that, and we turned around and won that one, too. So it was not that we got the union back out; the union is still in.

Senator SIMON. And what was the vote?

Ms. PRICE. We won by 13; I know that. But I want to say that 12 of those members were not members of the union who voted for the union, so they were satisfied.

Senator KENNEDY. Just to clarify, are you back in now?

Ms. PRICE. Yes.

Senator KENNEDY. You were decertified, and then——

Ms. PRICE. We negotiated our new contract after the decertification last February.

Mr. SILBERMAN. Senator, if I may, I think when Ms. Price says they were decertified, what she means is that there was a decerti-

fication petition that was filed; it was voted down, so the union was never decertified. It has been continuously in place since it was elected.

Senator KENNEDY. OK. Thank you.

Thank you, Madam Chairman.

The CHAIRMAN. Thank you.

Senator Frist—I would just like to say that your Tennessee constituents did a wonderful job on the first panel and gave exceptionally fine representation for the plants that they were representing.

Senator FRIST. Thank you, Madam Chairman.

I appreciate my constituents from Tennessee and also, you Madam, Chairman, for inviting them here today, and I am sorry I could not hear the first panel, those from TRW and Eastman.

As a new member of this committee and of the Senate, I view, based on my study, S. 295 as a way to clarify the National Labor Relations Act. If it does clarify that, other companies, other than the ones we have heard from today, and their employees will truly feel more comfortable participating in the forms of cooperation that we have heard about today.

I have no questions.

The CHAIRMAN. Thank you, Senator Frist.

Senator Pell?

Senator PELL. Thank you, Madam Chairman.

Why is it that in our competing countries, technologically advanced nations like Europe, Japan and so on, labor-management relations are going pretty smoothly, whereas in our own country, labor-management has had kind of a checkered history? How do you account for that?

Mr. COXSON. Senator, if I may respond to that, initially, I served as an employer representative to the International Labor Organization, so I have some knowledge and experience of other countries' labor relations laws and practices.

First of all, I would like to respond to your question earlier about co-determination. I think that the types of teams that we have heard described here today go far beyond co-determination. I think we are beyond that as a country. Co-determination empowers a few people at the top. Employee involvement is well beyond that because it empowers everyone in the workplace to engage in decision-making. So I think we are beyond co-determination.

But as far as labor relations in the United States compared to other countries, I would submit that recent strikes and activities in other countries indicate that labor relations are not very rosy in Europe and some other countries, either. And I think that the labor relations, and especially labor-management relations, in this country have improved dramatically from the time when this law was passed in the 1930's, when it was designed to prevent the type of sham unions that were then a problem, but no longer are.

Senator PELL. I wonder if one of the reasons is that we have a tradition of adversarial relations between labor and management, and this is not true necessarily in other countries. The tradition of it is encouraged by our political process, and it is improving, but I am wondering what you think might be done to improve it further.

Mr. SILBERMAN. Senator, you are taking me far outside the bounds of my expertise. This is the sort of question that President Kirkland would be far better and delighted to discuss with the committee. But I would note that I think what you say, from my limited perspective, is exactly right, and the Dunlop Commission did note that management in the United States, unlike in any other country, has been opposed to workers forming independent organizations. Management in this country has been trained and learned to believe that if workers form a union in this country, if they form their own representatives, that is a failure by management, that management has done something wrong. So management has to do whatever they can to discourage that, and you create this adversarial situation.

I do not know how we get away from that without changing the culture in a very profound way, but I think you are right in point out a very important problem.

Mr. COXSON. Senator, I would just add to that, I think the experience that was testified to today, workplace cooperation, is on the rise, both in union and nonunion settings. And this amendment is designed to preserve that type of cooperation.

Mr. MCCAMMON. Senator, Universal Dynamics was recently purchased by a German company. They assured us that one of the reasons why they purchased us was because of our ongoing employee involvement program that we do have and the way that we manage and run our relationship on the shop floor.

At the last meeting that the president of our company attended in Germany, one of the things that they pointed out was that they had already adopted our particular green sheet system in their plants over there. And our company would very easily fit inside one of their plant buildings. They were discussing how successful it was and how they really did enjoy it.

Senator PELL. Thank you very much.

Thank you, Madam Chairman.

The CHAIRMAN. Thank you, Senator Pell.

Senator Simon?

Senator SIMON. Thank you, Madam Chairman, and I thank all the members of the panel.

First, I do not know if Mr. Skiba is still here, but the other Tennessee TRW plant does have a contract with United Auto Workers. I would like to enter into the record an item from the BNA's Daily Labor Report, and let me read just three paragraphs of it, and this was written in 1993. "Last year's National Labor Relations Board decision in Electromation has not hampered companies from operating employee involvement programs, and any changes in Federal labor law intended to enhance the opportunity for establishing such programs should be considered carefully, former NLRB Chairman Edward B. Miller recently told the Commission of the Future of Worker-Management Relations."

"In written testimony submitted for the commission's regional meeting in East Lansing, MI earlier this month, Miller argued that 'it is indeed possible to have effective employee involvement programs of this kind in both union and nonunion companies without the necessity of any change in the current law.' He asserted that the 'so-called Electromation problem' is simply a 'myth.'"

"'While I represent management, I do not kid myself,' Miller said. 'If section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur.'"

And for those who may be concerned, the findings and purposes section of the legislation that is before us says, "Employee involvement structures which operate successfully in both unionized and nonunionized settings have been established by over 80 percent of the largest employers in the United States and exist in an estimated 30,000 workplaces."

Clearly the Electromation decision has not had a chilling effect. While we have been having this hearing, I have been reading the Electromation decision. It came about because in a plant of about 200 employees then—I do not know how many there are now—they reduced the benefits, and 68 employees signed a petition complaining about it. Then the management met with some of the employees, and the plant manager said we have a problem. So they set up what they called action committees, and those action committees dealt with the benefits and whatever they determined was going to be the agenda of the action committee. And an administrative law judge made a decision that in fact they were trying to have company unions, because part of this also was as soon as some of the employees said they were going to petition to have a union election, the company said, okay, if you do that, we are going to quit having action committees, and we are going to drop them.

The NLRB decision in 1992—this was before a Democratic President took over—says, "Applying these principles to the facts of this case, we find in agreement with the judge that the action committees constitute a labor organization within the meaning of section 25 of the Act and that the respondent dominated it within the meaning of section 8(a)(2)." The NLRB says, "interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by section 7 of this Act" had taken place.

Then, the three NLRB members who, among others, participated here—let me just quote briefly. "Section 8(a)(2) does not create obstacles for employers wishing to implement employee involvement programs as long as those programs do not impair the right of employees to free choice of bargaining representative." What is happening in Cookeville is clearly legal.

Another NLRB member said, "I find nothing in today's decision that should be read as a condemnation of cooperative programs and committees of the type I have outlined above. The statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace."

And another board member said, "On the facts recited by my colleagues, it is clear that the committees are labor organizations."

What the Electromation case does is make clear that management cannot set up committees to deal with the problems that labor unions ordinarily deal with, and then dictate the terms that you can consider and not violate the law. That is a company union, and I think the NLRB decision is a proper decision.

Thank you, Madam Chairman, and I thank the members of the panel.

[Document referred to may be found in the appendix.]

The CHAIRMAN. Senator Harkin?

Senator HARKIN. Thank you, Madam Chair. I will just make a short statement here, basically in concurrence with what Senator Simon was saying.

I just also find it difficult to understand the need to rush forward with this type of legislation at this time. I realize there is always room for improvement in labor-management relations. I know the world is changing, attitudes are changing, workplaces are changing, and our workplace practices need to be constantly updated to meet the needs of today's global economy.

I have visited a number of these types of workplaces where there is extensive workplace and shop floor cooperation, and they work well. Cooperative workplace committees do often have a positive impact on labor-management relations as well as a business' ability to compete.

Having said that, I question whether this bill is truly necessary to allow for cooperative committees to flourish, as some maintain. As Senator Simon just said, the legislation itself calls this into question. It states in the findings that employee involvement structures operate successfully in both unionized and nonunionized settings. Over 80 percent of the largest U.S. employers have cooperative committees, they exist in an estimated 30,000 workplaces.

So I guess I would just ask if employee involvement structures are already so prevalent and are able to operate within the confines of section 8(a)(2) of the NLRA, then I really just do not see any need for this legislation, unless there is another agenda behind this legislation. But in order to stimulate the type of cooperative workplace committees that it seems to purport, we seem to be already moving in that direction quite well. So I really just do not see the need to rush ahead with this type of legislation.

Mr. COXSON. Senator Harkin, if I may respond, Senator Simon mentioned a speech given by former NLRB member Ed Miller with respect to the need for this legislation. I would submit that, number one, the current chairman of the National Labor Relations Board, who will be deciding these cases, has stated that there is a need and has recommended this type of legislation in his book "Agenda for Reform."

Second, I am going to ask to submit for the record statements by former general counsels of the National Labor Relations Board which say, for example, in the case of John Irving, that "no NLRB decision in recent memory has done more to confuse and confound labor lawyers and human resource specialists, and for many years, we will be clearing the debris" left by the board members who decided that case, and that the case was so vague and contained so many internal inconsistencies and are so vulnerable that they are practically useless as guides.

I have with me also, and would just like to introduce one of my partners, John A. "Doc" Penello, who was one of the original employees of the National Labor Relations Board. He joined the NLRB in 1937, and he served as a board member, appointed by two Presidents. He was a Democratic member of the board and is a member of our firm, and he was around when there were company-dominated unions. I am pleased to say he is still around, and he knows

the difference between those days and today, and he very much supports this legislation. He is in the audience here today.

So that as far as board members are concerned, there are different views as to whether or not Electromation went as far as it did, but I think there is a general consensus on the part of NLRB members that legislation is necessary.

Mr. SILBERMAN. If I could add, Senator Harkin—it is a reflection of our times that Mr. Coxson here is quoting Bill Gould, and I am quoting John Irving—but the statement I have from Mr. Irving is that "the truth is that these dire predictions about the loss of an important employer communications tool are exaggerated."

But I think more significantly—and Senator Simon referred to part of it—before the Dunlop Commission, the National Association of Manufacturers came in and testified as follows: "The NAM believes that the current board and board chairman should be provided time and the opportunity to narrow and focus and constrain the effect of Electromation through whatever means the board has at its disposal. So we want to take a' wait and see' approach." This was on September 8, 1994, not very long ago.

The Labor Policy Association said the same thing: "We are willing to wait. We are willing to see how the board rules in some of these future cases." That was also on September 8th.

There has not been a single case since then. There has been an election, as Mr. Coxson referenced, but I would submit to you that the fact that there has been a change in political parties is not justification for a change in the law rather than allowing the regular processes to take their course.

Mr. COXSON. But David, there have been a number of subsequent cases, not just the Electromation case. Since those statements, there have been a number of subsequent cases, which makes the case law even more unclear.

Mr. SILBERMAN. To my knowledge, Harold, there has not been a single decision, except for a 4th Circuit ruling overturning the labor board and saying that they misapplied Electromation, decided since September 8th, 1994. Certainly, there has been no decision by the National Labor Relations Board. I am not aware of any ALJ decisions since then, but I do not want to stake my reputation on that; I could miss one.

Mr. COXSON. Yes. The Polaroid case was argued yesterday.

Mr. SILBERMAN. Right, but not decided.

Senator HARKIN. Argued but not decided. Well, it is an interesting debate.

I see my time is running out, too, but I guess my observation is—and I have looked at this, I do not see any real need to push ahead with this legislation now. I am willing to keep an open mind on whatever improves or enhances labor-management relations and these kinds of team programs. I have seen them work, and they work well. But I guess I would just go on record as saying that in this whole are of labor-management relations, I believe that a heavier burden is on management, a heavier burden to reach out, to enhance the position of workers, to enable them to form their groups. I believe a heavier burden is on management to permit workers to form these kinds of teams however those workers deem best and to get more information into how you can better design

the workroom floor, the shop floor, by the people who are out there doing it.

I say that because I believe that management—basically, they have the broader picture, they know more about what is happening out there with their business—they have a heavier burden. And I think with that burden then comes the responsibility, the responsibility to ensure that the people who are on that shop floor are not in any way intimidated, threatened, cowed, or in any way influenced to make a decision based upon what management may want them to decide. They should have a free flow of information, uninhibited, from those teams on how best to accomplish something.

Obviously, it is always up to management to decide exactly what is done, but those team members ought to have that ability to do that. I am concerned that with this proposed legislation, they will not have that, that there will be a subtle form of intimidation, management will pick, and choose just whom they want, rather than letting the workers pick their own team members, and other forms of excessive control.

So that is my position on it, and I think that management bears a greater burden and responsibility to enable these teams to operate more independently.

The CHAIRMAN. Thank you, Senator Harkin, very much.

I would just like to say in conclusion that I could not agree with you more. I think in many ways, the burden is on management to reach out and enhance the cooperative effort. We heard in the first panel from witnesses where it has worked very well. Clearly, there are other areas where it is a problem, and relationships are uncertain.

But I want to say I did not introduce this bill for the National Association of Manufacturers. I really do not necessarily care what they think, one way or the other. I did this because I believed it was very important to try to find some means to clarify and encourage cooperative efforts.

This is a list of 8(a)(2) cases that are pending in 1994, so it is not that there is really nothing out there, and there is great uncertainty. Some are union settings, some nonunion settings. That was my intent.

It has been said that we do not need to repeal section 8(a)(2). I am not repealing it. I am merely amending the language, and let me just say that where it is amended is that "it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain or participate in an organization or entity of any kind in which employees participate to address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization."

Now, there is always the risk, of course, that an employer is going to try to set up a sham organization. I do not think we can say we should not try to encourage the enhancement of different cooperative agreements just because we fear what may happen.

Protection will still be there under other parts of labor law. It clearly worked in the case of Electromation.

So I think that the protections are there, but we need the clarification, I would argue, and that was my the intent. But I could not agree more with Senator Harkin that I do believe it is management's responsibility to reach out and labor's responsibility to recognize that times can change, and neither side should fear that change, because I think protections do still exist.

Senator HARKIN. Well, I thank you, Madam Chair. Again, as I understand it from my limited knowledge of this, it has been somewhat successful—80 percent, 30,000 workplaces. Do we have to step into this thicket right now when it does seem to be working? I think anything that is 80 percent successful—I mean, that is a pretty good record around this place.

Mr. SILBERMAN. Senator, on a factual matter, although the document you held up is titled, "Status of Pending Cases," if you actually read the "current status" column, eight of the 14 cases listed there are not pending. There are six cases pending.

The CHAIRMAN. That is right.

Mr. SILBERMAN. And I would suggest that in the 2, 3, 4 years since Electromation arose, there have been six or eight cases out of these 30,000 or more places—that is not a very strong argument for a large problem.

The CHAIRMAN. But wouldn't you say, Mr. Silberman, that it has had a chilling effect?

Mr. SILBERMAN. No, absolutely not. All the studies that have been done have found that most of the new employee involvement programs are recent programs. Electromation is a case that was decided 2 years ago; the charge was filed, and it received a lot of attention 3 or 4 years ago. It is in the past 3 or 4 years that most of these new programs have been put into place.

It was fascinating to me that the Dunlop Commission went through a year and a half of hearings, and not a single company came forward and said, "We would like to do this, but our lawyers said no, we cannot."

Mr. MCCAMMON. Excuse me.

The CHAIRMAN. Mr. McCammon?

Mr. MCCAMMON. The president of our company did express that, and we are currently experiencing that right now.

The CHAIRMAN. Experiencing what, Mr. McCammon?

Mr. MCCAMMON. Our employee involvement program was full-blast ahead, and we are currently in a slight recession because of a fear that the company may possibly be in violation—not that they are, but just the fear that that exists has put certain curtailments on our employee involvement program.

The employees see the door opened, and they want to see it opened all the way. Now they see the door beginning to close again, and we are genuinely concerned about this. We feel that some type of action to keep the door open is what we would like to see, and we would like to see our employee involvement program get back on track and continue to expand.

Mr. COXSON. Senator, at yesterday's hearing in the House, a vice president for Texas Instruments testified that he was told by one of the NLRB members, or perhaps one of the former NLRB mem-

bers, that their program is okay, but just do not discuss anything important. I think that that is not the message that we want to send to workplaces and workers around the country, that they have to be careful what they discuss and that they should not discuss anything, quote-unquote "important."

Mr. SILBERMAN. And that is not what the current law says.

The CHAIRMAN. Senator Harkin, do you have any other comments?

Senator HARKIN. No. It is going to be a continuing debate, I think.

The CHAIRMAN. It will be a continuing debate.

We very much appreciate the thoughtful testimony that you have just given. I think it does help us as we move forward in this debate.

I would like to ask that a letter from the lawyers who represented Electromation in the lawsuit be made a part of the record.

[Letter referred to may be found in the appendix.]

Mr. COXSON. Senator, may I also offer two additional documents to accompany my testimony for the record?

The CHAIRMAN. Without objection, and the record will be kept open for any other documentation that anyone would like to make part of the record.

[Documents referred to may be found in the appendix.]

[The appendix follows.]

APPENDIX

Prepared Statement of Don Skiba

INTRODUCTION

Good morning Senators, Ladies & Gentlemen:

I am Don Skiba, Plant Manager at the TRW Vehicle Safety Systems facility in Cookeville, TN. Cookeville, TN is located on Interstate 40, one hour east of Nashville and one and one-half hours west of Knoxville. At TRW Cookeville, we build passenger-side air bags. In fact, we build the best passenger-side air bags in the world. I have with me this morning a group of my fellow employees who will discuss with you their personal experiences with employee involvement at our plant. Before they do, I'd like to tell you just a little bit about our facility.

PLANT HISTORY—THE CHALLENGE

The TRW Plant in Cookeville, TN is a 310,000 square-foot facility. Construction on the plant was started in 1989 and our first air bags were shipped to automotive customers in July of 1991. When TRW started construction on the facility, we had a tremendous challenge ahead of us. We would assemble a brand new product, one with a very dynamic and changing design. We would, in a very short period of time, be shipping 40 different products to 12 automotive customers on 4 continents, each with very different systems and requirements. We build a product that people depend on to save their lives, so we must operate on a zero-defects basis. In addition, we would have to grow to our current level of 800 employees very quickly utilizing some very high-tech equipment.

EMPLOYEE INVOLVEMENT

The management team decided early-on that the only way we could be successful in accomplishing our task was to build a facility where the culture allowed all employees to be involved, where everyone participated, where open communication is a way of life, and where each person has the power to drive positive change in the workplace. Our plant today is a team-based organization. It is an organization where no one punches a time-clock, an organization where everyone is treated the same, has the same benefits, and where the focus of everyone is on continuous improvement. Employees are involved in a wide variety of ways. We have included an overview of the major processes which employees are involved at our plant. (See Attachement A) Our employees will talk to you this morning about their experiences in this environment. I think you will enjoy it.

[Additional material may be found in committee files.]

Prepared Statement of Julie Smith

Good morning. My name is Julie Smith. I am a Team Advisor at TRW Vehicle Safety Systems in Cookeville, TN. Employee involvement is what makes our operation at Cookeville a success. For some of us, TRW is where we spend the majority of our time—for others of us it is our home. What employee involvement means to me is that we come to work, looking forward to starting our day and when we go home, we feel good about what we've done because we know we've had a direct influence on the decisions that effect our work environment.

HOW DOES EMPLOYEE INVOLVEMENT WORK?

How do manufacturing technicians who assemble air bags, office staff, maintenance, team advisor, engineers and quality technicians all come together? At Cookeville this happens in many ways but two in particular stand out in my mind.

NEW EMPLOYEE SELECTION PROCESS

The employee selection process is the most important area of involvement at our plant. (See Attachment B) Through this process, we are involved in hiring the people that help make the decisions and drive change-the people who are TRW. Manufacturing technicians and management come together in this process and make sure we hire the right people. As a group, we make choices about who will be added to our teams—who will help us be a better plant. We host large group information meetings and panel interviews where team members from all areas of the plant interview prospective employees and ask the questions: 1) will this person be a team player, 2) will they help us identify and solve problems, 3) does this person want

to use their mind as well as their hands? If we decide that we can answer "yes" to these questions, we invite the person on-board to join our family.

PEER REVIEW POLICY

Another critical area of involvement for everyone is the Peer Review Process. (See Attachment C) This is used if a person—any person—receives a final written warning or is terminated. They have the option to appeal the decision. A panel of co-workers, or peer panel, is selected by the employee affected. For example, if a manufacturing technician receives a final written warning, they select a peer panel. This peer panel consists of three manufacturing technicians and two members of management. There are consistently more peers than management on each panel. The panel hears the case and decides if the final written notice or termination should be upheld. If they decide the decision was unjust, the person is reinstated with full back pay and benefits. However, if the panel decides the decision was correct, then the employee is terminated. Either way, the panel of peers makes the final decision. These are two systems that everyone is involved in—whether you are an engineer, a manager, a team advisor, or a manufacturing tech.

HOW THIS AFFECTS MY JOB

What this means for TRW is our employees are empowered. We make decisions. Decisions are made together and we make a difference. With all of our ideas and creativity, we reach carefully thought-out decisions that help us achieve our goal of job security.

[Additional material may be found in committee files.]

PREPARED STATEMENT OF JOHNNY ALBERTSON

My name is Johnny Albertson. I am a Manufacturing Technician at TRW Vehicle Safety System's facility in Cookeville, TN. I am the oldest of 12 children. Just getting to TRW was a challenge for me. I retired from working at a grocery store after 15 years and I knew I wanted to do something different. Then I found out you had to have a high school diploma or your GED to work at TRW. Since I didn't get to finish high school, I went back and worked on my GED—passed it after studying for a month—and then applied and was offered my job. I was nervous at first, but the people were great to work with and helped me through it. Today, I've worked on almost every line at the plant and enjoy being able to help on any line that I am needed.

EMPLOYEE INVOLVEMENT

The best example of Employee Involvement I can think of is a process we call CIP which means Continuous Improvement Process. (See Attachment D) On my line we started this process by working with our engineers and other departments. First we were trained on how to brainstorm and how the process works—then we brainstormed how to improve our line. When we started this process, we were assembling approximately 48 modules per hour. Soon after initiation of the program, we had increased our production to 100 modules per hour due to the improvements we made. Amazingly, it was a easier to make the 100 than to make the 48! Everyone submitted ideas and the worked together to implement them on the line. No one person—not the engineers, quality or manufacturing techs—could have changed things that much alone. It took everybody. And now it's a mindset—something that we are always working on.

It's interesting how continuous improvement applies to me personally, too. Since I obtained my GED and came to TRW, I've taken computer classes at our plant including Lotus, WordPerfect, Network, and Maxcim. Currently, I'm taking Maintenance courses at Nashville Tech working toward an Associate's degree. TRW pays my tuition and I will finish in a couple of years. There is also an Employee Development Center at the plant which has software available for employees to check out, as well as books and other media to help employees learn anything they are interested in. I'm taking advantage of it all.

Because of everything that I've learned, I can do numerous things at the Plant. This has made me flexible, so if my line is not working, I can help another line with heavy production numbers. I have learned a lot about our lines and the maintenance courses I'm taking are helping me learn even more. It's really great to work for a place that doesn't box you in—where you can learn more and do more and different things. The main thing I want you to remember is that I like being involved, I like learning, and I like my job. I'd like to thank you for your time, and I'd like to thank TRW for my future.

[Additional material may be found in committee files.]

PREPARED STATEMENT OF ANGIE COWAN

My name is Angie Cowan. I'm the Rework Coordinator at TRW Cookeville. The biggest difference between TRW Cookeville and other businesses are employee involvement and communication. Other plants, businesses, even our government can use TRW's employee involvement as a role model to be efficient and successful. The only problem with Employee Involvement in America is that there isn't enough of it.

SIX FUNDAMENTALS OF MANUFACTURING

All of our employee and continuous improvement activities in the plant are derived from the desire to improve our performance. We focus on six fundamentals of manufacturing. These include quality, delivery, effectiveness, safety, waste elimination, and housekeeping. (See Attachment E) Each line or team measures themselves against improvement goals in each of these areas. Technicians from each line track data in each area. Each line has a visual management board to record the performance information. There are recognition programs for each fundamental to give incentive and reward the team's performance. This recognition includes plaques for individual fundamental performances and a special flag which is flown above the line(s) which meets its goal in each of the fundamental areas. There are coordinators for each of these fundamentals which are rotated on a monthly basis. Coordinators take responsibility for monitoring improvements and issues related to each of the Angie Cowan, Rework Coordinator fundamentals. We also have a line coordinator, who is responsible for knowing and opening our work schedule for the day. Continuous improvement in these six areas provide us with a better place to work, a more satisfied customer, and continued growth and strength in our business.

TEAM INVOLVEMENT

We have team meetings whenever needed to discuss team issues, such as line rotation schedules, change of breaks and or lunch, change of schedule, and safety or housekeeping films.

We also have an emergency response team, which has voluntary members from every section of the plant. I'm a part of that group, and we have learned how to use a fire extinguisher, CPR, how to handle blood, and how to think in an emergency.

We have skip level meetings in which representatives from the lines meet with their manager's manager and an HR rep to bring up issues or resolve problems. Answers to problems are posted on our communications boards on the lines for all employees to see.

COMMUNITY SERVICE INVOLVEMENT

Employees are also voluntarily involved in a lot of community services. The Angel Tree at Christmas is the most popular and one of my favorites. Children's names and wishes are placed on the tree, and employees work together to make those wishes come true. There has been so much participation, we have had to get more names for the tree every year. The Corporate Cup Challenge is a big fitness event in which TRW competes with other companies in the area. A lot of people participate—because we want to win—and we did win in 1994! We have a chance to give to the United Way as well. It is not mandatory, but it is offered, and we have just about the highest involvement in the county. We also have a Day of Caring program, in which TRW pays for each employee to do one day of community service, building things or improving things as a team. We have adopted a local elementary school, and save our aluminum cans, volunteer our time at carnivals, and even judge science fairs.

COMMUNICATION

The communication at TRW Cookeville can't be beat. We know that we can call anybody at any time without having a middle person. That is the best thing about TRW. We have to be able to work together because our customers are demanding and expect quality parts received on time. If we can't communicate and work together, we will miss shipments and lose customers and eventually lose our jobs. Our lines are families. Everyone that has anything to do with our lines are also in the "work" family, including engineers, business team managers, quality, and material techs. So in order to have a successful team we have to be able to communicate.

TOURS AND CUSTOMER INVOLVEMENT

One of the best things I get to do at TRW is give tours. These are exciting to do, because I can talk to people, regardless of their job titles, on a one on one basis and let them see how excited about TRW I am. I've got to tour some real cool people. Such as Ford executives, Chrysler executives, TRW executives and also the president of Renault. Many of these people are making decisions that affect our future business, and the information I give them can be an important part of their decision. I know that what I do has an impact, and I'm proud to work for a company that trusts me with that kind of responsibility. We are involved with customers in other ways as well. It is not unusual for Manufacturing Technicians to travel to customer sites to work, educate, and problem solve.

It's difficult, in a short period of time, to adequately communicate the positive impact that employee involvement activities have had in our plant. We also cannot detail all of our programs to you this morning and there are numerous programs. But I believe I speak for all Cookeville employees when I say that our employee involvement programs are uplifting to everyone, encouraging them to grow their skills and make our plant even more competitive in the world-wide air bag market.

In closing, I'd like to ask a question. How many of you can say, "I've got the best boss in the world?" I can. I really love my job.

[Additional material may be found in committee files.]

PREPARED STATEMENT OF KEVIN KING

Good morning, I'm Kevin King. I've worked for Eastman Chemical Co. for 18 years. I'm a Quality Management Facilitator. In this job, I work with teams in the Cellulose Esters Division to help them identify and implement improvement projects.

I worked for Eastman before we began using teamwork. At that time, when employees saw a better way to do something, their ideas were met with comments like, "That's not your job to come up with those solutions." You got directions from your supervision. It got awfully frustrating over a period of time to see solutions to problems and not be able to implement them.

In the mid 1980s, Eastman began using participative quality management. This is a process we use to focus on customers an on the continual improvement of our processes and products. All employees participate as members of teams and help manage their own part of the business to serve their customers better and to continually look for better ways to improve their products or services. This enables us to benefit from the ideas of all employees.

I've had the opportunity to work on many teams. Some were natural unit teams. The natural unit team is your crew that you work with day in and day out. In our natural unit team, we're continually looking for the small improvements that make the difference in our products and processes. I've also worked on cross functional teams, which have people from various work groups brought together to address a common problem.

Let me give you an example. We make a product that goes to 3M for their Scotch Tape. Previously, we sold them only half of what they needed. They got the other half from one of our competitors. An important product characteristic for 3M for this product is viscosity, that is the rate at which it will flow. Having consistent viscosity for every shipment is very important to the customer. We put together a team to improve our viscosity control, and we spent 3 years working on this problem. By reducing the variation of the viscosity of this product, we made our product more desirable to our customer. As a result, 3M has chose Eastman as its sole supplier.

As a facilitator, I now work with many different teams in my division. But we all use the same 5 step problem solving process to achieve results. First, we identify the problem and then we try to start understanding the process. As a chemical company, we use many different processes to manufacture our products. The team must understand everything about the particular manufacturing process before we can begin to solve the particular Kevin King problem. Sometimes, we draw a flowchart of the process. Now, a flowchart is a diagram illustrating all steps involved in a process. With flowcharts, we can look at each individual step in the process and how they all work together.

Then the team looks at all the procedures and how we are currently doing things. The team decides if this is the best agreed upon way to do them. This is called standardizing the procedures. It ensures that we're doing the same thing the same way every time.

The next step is to begin looking for the root cause of the problem. The team brainstorms, looks at cause and effect, and sometimes draws diagrams to see what might be causing the problem. We then come up with some remedies and solutions.

We follow a plan/do/check/act cycle as we implement these solutions. Finally, we look at the results we're getting by using the improved process. If the results are acceptable, and it's what the team really needs to see happening, we standardize those new procedures. In that way, the new process becomes a permanent part of the job.

The team then goes into a maintain the gain system so that we won't have to "reinvent the wheel" the next time we have a problem with this process. We look at what data needs to be monitored, how often we need to monitor it, who will monitor this data, and what will happen when the results are unacceptable. The team will also try to attach some cost savings to what the team accomplished.

If my company is going to be globally competitive, if we're going to stay in the marketplace, we've all got to take a part in helping the company get better and better. Our jobs require that we all continually look for ways to make the company more competitive by adding value to the products that we manufacture. The efforts of all of our teams and the quality systems that we have in place were recognized when we won the Malcolm Baldrige National Quality Award in 1993. We're proud of what our teams are accomplishing. It's been my pleasure to share with you our achievements. Thank you.

Prepared Statement of Lori Garrett

Good morning, I'm Lori Garrett. I am a Control System Mechanic Apprentice, and I've worked for Eastman for 4 years.

Unlike Kevin, I've never known work before teams, but I can tell you that I'm really personally committed to teamwork. When I was hired in, was a buffer worker. I was in a pool of newly hired employees who were assigned to different areas to do general labor and clean up work around the plant. My duties were to clean and dust the electrical rooms. One day I was in the shop cleaning up and filing some vendor manuals. As I was filing those, I ran across a piece of paper that was old and yellow. It turned out to be an electrical inspection checklist. I thought that as I cleaned the electrical room, I should benchmark against that checklist to make sure I was doing everything I should. One of the items on the list was to see that all of the directories to the circuits were up to date. These directories show what circuits feed different equipment, just like the panel on your home's circuit box does for your household appliances. I could tell that these directories had not been updated for awhile. So I went to our department head, whom had never seen before. I just called and asked for a meeting with him. I had made copies of the existing directories and took the originals with me. said, "What can we do about this?" And he asked me what I thought we should do. I told him that I thought we should get "this changed, and that changed, and that changed." He said that I could give it a try and see what could do. So I worked on it, putting together a team of people who could have an impact on this problem. We made Engineering aware of it; we got our operations people involved. As a buffer worker, I didn't have a lot of status and certainly no formal power. But I was respected on the team, and each person had valuable input.

We created a computerized system to update all of the directories to the circuits in all of the electrical rooms. Employees who work in these areas have access to this computer system and can update the directories at any time they make a change in any electrical system. Now, instead of clumsy paper files, we can reference and update our circuits directories with a few keystrokes on a computer. Immediately after implementation, we calculated our cost savings. These savings came from improved engineering design capabilities in the Engineering Division, as well as improved accessibility. Engineering as well as Plant Maintenance saw improvement through enhanced equipment reliability. We saved over $ 1.1 million dollars the first year, and we've added an additional half-million dollars per year since then. It's a nice impact to have. So you can see that teamwork started off really positive for me.

This was a cross-functional team of employees from all areas involved with electrical rooms. But I'm also a member of the natural unit team which is my work group in the Plant Maintenance Division. My team used to meet every week for any hour, but we decided that meeting every other week for two hours gave us more time to concentrate on solving problems.

In our Natural Unit Team, we use a shared leadership concept, rotating the leader's role. The leader sits at the head of the table and calls the group to order. The leader helps us not to dwell too long on any particular issue and tries to stick to a time frame. The leader is responsible for organizing the agenda and listing any specific points that may need to be addressed. This first part of the meeting is open to news and information; it's a general part of the meeting. Then we go into data

review where we review any specific measures that our teams would like to look at every two weeks. We review this data and have discussions about them if necessary.

We then go into a step called problem solving. We actually list any new problems or nay new concerns that we may have, and we list these on a board so everybody is aware of them. That way, you know that you have been recognized. From there, we will have discussion about any of those items and decide whether they need to be put on our problem solving list. Maybe it's an item we can immediately address. Or, we may need to look at it at a later time or a late meeting. If there are several, we'll try to prioritize those, focusing our problem solving on the ones that maybe have the most significant impact. And for the remainder of the meeting, we work on those. As we go through that problem solving, we'll assign different team members to be responsible for different things on an action register. The register has the name of the person who is responsible, the particular action that they need to perform, and a date, so we know that it will be done by then. When we meet again, we'll review that action register and make sure that those things have been done. We conclude our meeting by planning for the next one, so we don't waste our time wondering what needs to be done. We have it planned out, which helps in the agenda preparation. At the end of each meeting we evaluate it to make sure that we haven't been wasting our time and that we have had significant participation and have made improvements.

A lot of what appeals to me in teamwork is seeing how improvements are made and put into place. What I like about teams is that no matter what level you're on, even when you're an entry level worker, you can really have a very significant impact. Thank you.

PREPARED STATEMENT OF CHESTER MCCAMMON

Senator Kassebaum and members of the committee, my name is Chester McCammon. I am a member and team leader of a self-directed team at Universal Dynamics Corp. in Woodbridge, VA.

I appreciate your invitation to appear before the committee to share some thoughts on the importance of employee involvement worker-management cooperation on behalf of my fellow workers at Universal Dynamics. We thank you for introducing S. 295, the Teamwork for Employees and Management (TEAM) Act, that would make it clear such activities are permitted.

For your information, I have been a member of five union locals in the industrial and marine sectors, including the Boilermakers and Teamsters, in companies that ranged in size for ten to more than a 1,000 employees. In addition, I operated a small business for seven years. I believe in the right of employee choice as strongly as I believe in employee involvement.

This is the third time I've come to Washington to talk about a worker's view of employee involvement. Last August, I joined Don Rainville, president of Universal Dynamics and a member of the National Association of Manufacturers's Board of Directors, to testify on this issue before the Dunlop Commission. More recently, a fellow worker and I took part in a press conference when the TEAM Act was introduced.

Through interaction with fellow workers, I have noticed a growing desire in them to participate in the decision-making process at work. This is accompanied by a growing frustration, because the opportunity to do so simply does not seem to exist under current laws and their interpretation.

Most workers don't know this and believe management is intentionally preventing their participation. This misconception is combined with the belief that dictatorial line management is the standard. Further, no matter how benevolent the dictators, workers believe as soon as sufficient pressure is exerted, managers will regress to the use of whip-cracking and coercion. These are only some of the circumstances that are responsible for the "us-them" attitude found in many American workplaces.

If this attitude is to be changed, management must make the first move. After reviewing portions of the National Labor Relations Act, I have come to believe that current interpretation of labor laws hinder management groups that are genuinely trying to bring about positive changes in their labor management relationships. At the same time, this gives others an excuse not to even try to change.

I would like to see interpretation of the law that would allow a wider range of employee participation in the management process, and that would allow management to make the first move toward changing management-labor relationships so that they are based on trust, respect and cooperation.

In addition to these changes in the law, a program should be instituted that encourages and rewards businesses for their efforts to promote greater employee participation and involvement in the management process.

I am particularly interested in some of the questions in the interim Report of the Commission on the Future of Worker Management Relations. I would like to share some of my thoughts offered last summer in my statement to the commission since I think they apply also to the TEAM Act.

We can enhance workplace relationships by understanding that they are the same as what we would find at home. We must realize that they will take as much care and maintenance as our personal relationships. The keys to success are education and open and honest communication with the mutual belief of no reprisals for speaking one's mind. Patience and putting aside one's own ego will also be necessary.

There is a very deep but unrealized interest in participation in the American work force. What keeps employees from taking initiative is fear. Fear of changing management's view of oneself from positive to negative. Fear of loss of opportunity for advancement. Fear of loss of income. But mostly, fear of the unknown. Communication and education can help dispel these fears. Management has fears also. What can they legally do to encourage real employee participation?

Management should make the first move. Managers should speak to workers, first as a group, then to individuals. Managers should be persistent, asking for feedback until they get an answer. Workers will only take you as seriously as you present yourself. Often, resistance is used as a device to measure management's degree of commitment.

I believe that if workers do not have a voice in determining what the outcome of their participation will be, they may believe that management interests are hypocritical and self-serving.

There is no start-up cost for an employee participation program. As for downsizing and pressure for short-term results, well, these are just normal conditions from the worker's point of view, at the bottom of the food chain.

My only thoughts on this are related to non-union and union businesses. If workers at a certain business have rejected unionization, the company should have no fear or impediment to instituting employee participation programs. The same applies to companies with unions as long as they deal with the union.

I believe that a program to educate management and labor in the benefits of adopting such new systems as TQM, TQC and JIT would be of great value. Also useful would be programs that offer assistance, incentive and rewards to those who move in those directions. The government posture should be one of education, not enforcement.

In conclusion, I'd like to say that the question is not whether, but when will the NLRB and the Congress recognize what's happening on the shop floor. The opportunity for employers and employees to work cooperatively, as the TEAM Act would provide, is essential to each party and the Nation.

Thank you.

Prepared Statement of Harold P. Coxson

Chairman Kassebaum and Members of the Committee, I appreciate your invitation to participate in today's hearings on the subject of "Employee Involvement and Worker Participation." My name is Harold Coxson. I am a principal in the labor and employment law firm of Coleman, Coxson, Penello, Fogleman & Cowen, P.C. located in Washington, DC.

I appear before you today as a representative of the TEAM Coalition, which is a newly organized group of companies, trade associations and workplace teams that support the principle of employee involvement and worker participation in decision-making. Specifically, we support enactment of legislation, such as the "Teamwork for Employees and Management (TEAM) Act," S. 295/H.R. 743, which would remove outmoded, highly technical, and I believe unintended legal and federal labor law barriers from the 1930's that jeopardize today's cooperative employer-employee relationships in tens of thousands of American workplaces.

WHAT IS EMPLOYEE IMVOLVEMENT?

Over the past several decades, especially as the American work force has responded to increasing global and domestic competition, new technologies and changing workplace skills, there has been a substantial expansion in the number and variety of employee involvement programs and workplace committees, or "teams." This expansion has occurred both in the workplaces governed by collective bargaining agreements and those without union representation. These cooperative systems of

work organization take a wide variety of forms: quality circles, employee participation teams, total quality management teams, team-based work groups with a wide variety of responsibilities (including workplace productivity, quality and efficiency), safety and health committees, joint worker-management teams formed to address specific workplace problems and, perhaps the most advanced form of worker empowerment, self-directed work teams in which workers themselves make decisions on hiring, progression, termination, assignments, scheduling and so on. It would be impossible for me to describe a single, universal model of workplace cooperation. Clearly, there is no one-size-fits-all approach to workplace committees. The flexibility is essential to allow employers and employees to construct a program which makes the most sense in the context of their particular workplace.

You have heard today from members of work teams from both large and small companies, who have described various forms of employee involvement and worker participation programs. These are neither isolated nor anecdotal. They are not talking about committees which exist merely to share information, plan educational programs, brainstorming groups, or suggestion boxes, to which union representatives derisively refer. Today's joint employer-employee workplace teams empower workers to participate in real decision-making in all areas of work life.

As last year's Fact-Finding Report of the Commission on the Future of Worker-Management Relations ("Dunlop Commission") observed, these types of programs exist in literally tens of thousands of workplaces diffused throughout all geographic regions of the country, all industrial sectors in both large and small businesses, and in both union and non-union settings.

WHY IS EMPLOYEE INVOLVEMENT IMPORTANT?

Recent studies reflect the growing use of employee involvement programs. For example, surveys in 1987 and 1990 of the Fortune 1000 firms by the General Accounting Office (GAO) and the University of Southern California report that 86 percent of these large firms in the manufacturing and service sectors utilize employee involvement. Significantly, a 1991 survey of smaller establishments with 50 or fewer employees found that 64 percent have employee involvement activities, covering 50 percent or more of their non-managerial blue or white collar workers directly involved in the production and/or delivery of the firm's products and services. The evidence reflects that employee involvement is now growing most rapidly among smaller firms.

Perhaps most importantly, according to a 1994 survey by Princeton Survey Research Associates (Freeman/Rogers Survey), where methodology was acknowledged as reliable by the AFL-CIO, workers themselves by an overwhelming 2-1 margin support and prefer cooperative joint worker-management teams over either union representation or additional legal mandates from Washington as the best way to increase employee influence. In addition, the survey reflects that a majority of workers believe that employee involvement improves problem solving and economic competitiveness.

The president and COO of Whirlpool Corp., William D. Marohn, testified before the Dunlop Commission that "a significant driver of [Whirlpool's] business improvement has been our strategy of comprehensive employee participation." (Statement of November 8, 1993) He described Whirlpool's work organization as follows:

> "Whirlpool wants to build American appliances with American workers but that's not always easy to do. Although competition has moved production outside of the U.S., Whirlpool has expanded its U.S. work force. At Whirlpool, more than 95% of the refrigerators, ranges, washers and dryers we sell in the U.S. are built by the 18,000 plus employees working at our American manufacturing facilities.
>
> . . . [w]e empower our employees. Our production workers, individually and on teams, are responsible for ensuring quality, for reducing scrap and improving productivity. But more importantly, they are empowered to manage themselves.
>
> At several facilities, new employees are interviewed, selected, hired and trained solely by their fellow production workers. And who better to know what's needed on the shop floor than those individuals who work there. Employee training, skill building, appraisals and promotions in our empowered plants are all done by production workers with their peers. Even employee discipline, including termination recommendations, is the responsibility of the production employee team at several U.S. plants.

We have taken this step further at one plant where we have created participation through self-managed work teams. Production scheduling, job assignments, safety

responsibility, employee promotions, discipline, communications training . . . [are the responsibility of the production employees.)

> Employee involvement or teaming has taken on a different look at all of our facilities as it must. Our unionized locations work together through Labor Management Committees while our non-union operations use work groups and production improvement teams. However, regardless of the representational status of the plant, the common factor is our goal to give our production employees the authority to do what they need to improve their jobs and our products. This leads to mutual business security for all.
>
> Anything that compromises the cooperation between employees and management and participation by employees in business decisions is not in this nation's best interests—short or long term."

As the recently issued Final Report of the Dunlop Commission concludes: "The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms and the national economy." (Report and Recommendations, p. xvii).

The Commission endorses expanded coverage of employee participation to more workers, more workplaces and to more issues and decisions. The Commission found:

> "Employee participation and labor-management partnerships are essential to improved productivity, enhanced quality and economic performance, and an increased voice and higher living standards for American workers. It is in the national interest to see participation and partnerships sustained and expanded to cover a larger proportion of the American work force and workplaces, and to address the full range of issues critical to improving workplace performance and advancing workers' economic positions and quality of working lives. It is also in the national interest to experiment with alternative forms of participation and cooperative labor-management relations to meet workers' varied needs and circumstances." (Report and Recommendations, p. 4).

WHAT IS THE PROBLEM?

With such widespread agreement on the value of workplace cooperation through employee involvement and worker participation teams in both union and non-union settings, why is there a problem?

Simply stated, the problem is a provision of the National Labor Relations Act—Section 8(a)(2)[1] written in the 1930's during a very turbulent period in labor-management relations. Section 8(a)(2) was designed to prevent companies from creating company-dominated or so-called "sham" unions. This very broad proscription of Section 8(a)(2), together with the all-encompassing definition of "labor organization" in Section 2(5)[2] of the Act, which were successful in preventing companies from forming sham unions now serve an unintended purpose.

Unfortunately, the same sections of the Act which prevent formation of the 1930's style "sham" unions, also act as a barrier to today's legitimate workplace cooperation and employee empowerment vital in both union and non-union settings as we enter the 21st century. This threat has become manifest to employees and employers alike as a result of recent decisions of the National Labor Relations Board (NLRB), most notably in the well publicized Electromation and DuPont cases. The threat of unfair labor practice charges and an order by the NLRB for workers and employers to disestablish workplace teams, operates as a chill on legitimate and long-standing cooperative relationships throughout the country. The perceived threat is expressed again by Whirlpool's president:

> "I see excellent employee-management relations at Whirlpool because of our cooperation and participation. But a threat does exist to the continued improvement and success at Whirlpool and throughout the United States. The threat is found in the NLRB's recent rulings in the cases of Electromation and DuPont under Section 8(a)(2) of the Labor Act.

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[1] Section 8(a)(2) of the Act, 29 U.S.C. §158(a)(2), makes it an unfair labor practice for an employer: to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the (National Labor Relations) Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

[2] Section 2(5) of the statute, 29 U.S.C. §152(5), defines "labor organization" much more broadly as: any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

I have no intentions of debating the fine points of what constitute a "labor organization" or "domination" under the law; however, as a business leader operating in a challenging global environment, I know that any ruling that compromises our ability to involve our people . . . to empower our workers . . . to commit to our employees . . . puts every American job in peril.

If we can't empower our people, we can't compete successfully."

(Statement of November 8, 1993 to the Dunlop Commission).

Nothing, perhaps, better demonstrates the chill on all team involvement and employee participation programs than the recent unfair labor practice charges filed with the NLRB not by an employee or a union but by a former labor law professor against the Donnelly Company's employee involvement program in Holland, MI. The Donnelly Co. has consistently been voted one of "America's 100 Best Companies to Work For." The company was attacked for its highly acclaimed participative management system—a democratic method of governance that has made the family-founded, public company famous for 30 years. The unfair labor practice charge was based on the company's testimony before the Dunlop Commission (which, incidentally, also commended the company for its successful cooperative employer-employee relations programs).

Without regard to the ultimate resolution of the Donnelly Co. charge, the legal uncertainties created by the Labor Board's rulings and the filing of random unfair labor practice charges attacking well-respected, established workplace practices, threatens to destabilize cooperative relationships between workers and employers throughout the country.

WHAT IS THE SOLUTION?

Some noted pro-union advocates, such as Harvard labor law professor Paul Weiler, have called for repeal of Section 8(a)(2) accompanied, of course, by a host of other labor law changes. He and fellow Dunlop Commission member Thomas Kochan of MIT apparently believe that the TEAM Act, S. 295/H.R. 743, does not go far enough in correcting Section 8(a)(2).

We do not yet go so far as seeking repeal of Section 8(a)(2). It is obvious, however, that clarifying amendments to Section 8(a)(2), Section 2(5), or both, must be enacted to assure the continued viability and vitality of employee involvement programs, and to remove the cloud of legal uncertainties which frustrate legal counsel. As frustrating as the uncertain state of the law is for larger companies with in-house counsel and legal staffs, imagine the frustration for small companies without the resources to employ in-house counsel or retain the services of outside law firms to defend them from unfair labor practice charges. The uncertainties can only be resolved by legislative amendment.

We note, also, that the Dunlop Commission, with the lone dissent of former UAW president Douglas Fraser, recognizes the need a for legislative amendment of Section 8(a)(2) "so that employee involvement programs . . . are legal as long as they do not allow for a rebirth of the company unions the section was designed to outlaw. "(Report and Recommendations, p. 7) We concur and note that this is the purpose and intention of legislation such as the TEAM Act (S. 295/H.R. 743). While we cannot agree with either the Commission's suggested limitations which restrict non-union employee involvement programs to discussions only "incidental" to terms and conditions of employment, nor with the Commission's broad swath of recommendations for other amendments to the Act, we endorse the Commission's overall objective that "workers and managers participating in these programs (should) be able to do so effectively, with gains for both, without skirting or breaking the law." (Report and Recommendations, p. 7)

The answer is not, we believe, simply to let the NLRB "change its mind" through new decisions or rulemaking, as advocated by some union spokespersons in an effort to ward off this legislation. Indeed, the folly of that proposed solution contains the very dilemma which has brought about the current legal crisis. Without a clarifying legislative amendment and appropriate legislative history to guide the Labor Board, it will be left to the swinging political pendulum and vagaries of each succeeding Board to interpret and reinterpret this section of the law based solely on congressional dictates and legislative history of the 1930's.

We believe Congress must act to clarify this area of the National Labor Relations Act in light of current practices and 21st century goals.

WHAT IS THE PURPOSE OF THE AMENDMENT?

Team involvement and employee participation is not a union versus non-union issue. Neither should it be viewed as a narrow partisan political issue. It is an eco-

nomic survival issue and a jobs issue—an issue vital to our national interest in the increasingly challenging marketplace of global competition. We see the success of these workplace programs in union and non-union plants and business establishments, in big and small facilities, in all geographic regions of the country. But we believe that for employees and employers to continue to grow and be successful, to keep American jobs in the United States, it is critical to preserve and encourage cooperative employee involvement programs.

The purpose of the TEAM Act, S. 295/H.R. 743, and our reason for supporting it, is not as a smokescreen to permit a return to the 1930's style "sham" unions, as spokespersons for organized labor would have you believe. Neither is it our purpose—or the purpose of the TEAM Act, S. 295/H.R. 743, to weaken unions. To the contrary, we seek to leave intact the labor law prohibition against "sham" unions and in no way reduce the right of employees to form or join a union if they so choose. Obviously, the sponsors of the TEAM Act, S. 295/H.R. 743, have drafted the legislation with the same limited purpose—to clarify the law's destabilizing legal uncertainties in this area and to protect the right of legitimate workplace cooperative programs or "teams" without disturbing other sections of the Act.

We agree with the statement of former NLRB General Counsel Rosemary M. Collyer that:

> "The 1935 Congress envisioned labor unions as the sole method for employee involvement. The last decade has demonstrated that unions continue to perform a unique and invaluable service in obtaining exclusive representation and negotiating collective bargaining contracts which set terms and conditions (of employment) and employee rights for a definite period—but (also) that employees may achieve significant job satisfaction and self-direction through other forms of Employee Involvement programs as well."

Statement of Rosemary M. Collyer before the House Economic and Educational Opportunity Subcommittee on Employer-Employee Relations, Feb. 8, 1995.

The TEAM Act, S. 295/H.R. 743, in its broadest sense is a worker protection amendment, designed to preserve and protect the rights of millions of America's workers among the nearly 89 percent of the work force who are not represented by a labor union. It protects their right to participate in joint employer-employee work teams. At the same time, the TEAM Act, S. 295/H.R. 743 does nothing to impede the legitimate rights of workers to engage in collective bargaining or to seek union representation.

As the 1994 Harris/Rogers survey reflects, an overwhelming majority of workers support joint worker-management teams. They need the law's protections. We urge you to support the TEAM Act, S.295/H.R. 743, to preserve the rights of these workers and the ability of American employers to compete by fully using the knowledge, sills and directions of their employees.

Prepared Statement of David M. Silberman

Madam Chairman: S. 295 raises large issues of the right national labor policy for the twenty-first century. These are issues on which the AFL-CIO holds strong views. It is our hope that at the appropriate point in this Committee's consideration of this legislation, President Kirkland will have the opportunity to discuss these issues with you. At the same time, I want to thank the Committee for the opportunity to participate in this panel discussion.

It is helpful I believe to begin the hearing process by addressing S. 295 on its own terms. The central purpose of this bill is, to quote from §2(b), to "protect legitimate employee involvement structures against governmental interference"; the premise, stated in the bill's findings, is that such involvement" is currently threatened" by §8(a) (2) of the National Labor Relations Act. At the same time, S. 295 states an intent to "preserve existing protections against deceptive, coercive employer practices."

S. 295 thus poses two questions: first, is the government through §8(a)(2) threatening "legitimate employee involvement structures"; and second, if so, does the proposed legislation "preserve existing protections." To justify this legislation, both questions must be answered in the affirmative. In fact, the answer to each of these questions is in the negative. As I will discuss today, the proponents of S. 295—who have every necessary resource and every natural incentive—have not shown anything to substantiate the claim that §8(a)(2) interferes with legitimate employee involvement structures. And, by its terms, S. 295 would tear large holes in the current protections against "deceptive, coercive employer practices."

1. Turning first to the language of the current law it is immediately apparent that §8(a)(2) is not an across-the-board prohibition on employee involvement programs.

Rather the law draws a line between legitimate and illegitimate forms of employee involvement by prohibiting one—and only one—type of involvement program: namely, "involving" employees in an employee organization or an employee representation plan which is dominated by the employer and which deals with the employer with respect to the employees' wages or other terms of employment. All other forms of employee involvement fall outside the reach of §8(a)(2).

Of particular importance here, although S. 295 is named the TEAM Act, there is nothing in §8(a)(2) that regulates work teams (or any other form of work organization). Indeed, the National Labor Relations Board specifically so held in General Foods Corp., 231 NLRB 1232 (1977). Since General Foods there has not been a single case to reach the Board which even questioned the legality of such teams. Thus, §8(a)(2) simply has nothing to say about the kinds of arrangements which were trumpeted at the press conference unveiling this bill in which employees are cross-trained in a variety of different functions and, as a group, given overall responsibility for a process or product.

Similarly, the proponents of the bill have described impressive-sounding programs in which employees are engaged in reengineering a work process or in otherwise improving the quality and efficiency of a firm's operations. Again, §8(a)(2) leaves wide latitude for such programs. Indeed, the National Labor Relations Board has never found a productivity or quality employee involvement program to be unlawful. (There is a case now pending before the Board which will afford the NLRB its first opportunity to clarify the permissible §8(a)(2) limits of quality/productivity employee involvement programs; until the November elections the business community publicly stated that it was content to await further NLRB decisions before determining whether legislative change was needed.)

The best proof that current law is not inhibiting the growth of legitimate employee involvement structures comes from the world of practical affairs. The reality is that these programs are flourishing today. The related reality is that in the last twenty years the NLRB has issued a total of just 58 orders requiring an employer to disband a program under §8(a)(2); in all but three of those cases the employers had committed a variety of other unfair labor practices as well in an effort to defeat a union organizing effort or subvert an existing collective bargaining relationship. The fact that the proponents of S. 295 are able to point to so many current, successful involvement programs—and are unable to point to any adverse §8(a)(2) decisions—confirms that existing law is not impeding legitimate involvement.

The NLRB's decision in Electromation, Inc., 309 NLRB No. 163 (1992), enf'd, 35 F.3d 1138 (7th Cir. 1994), which the proponents of S. 295 cite as the evidence of what is wrong with the current law, points the other way.

Electromation had nothing to do with developing a new work organization or new form of labor-management relationship. To the contrary, Electromation arose in a traditionally-run manufacturing facility in which the employer, in an effort to save money, unilaterally decided to reduce certain employee benefits. Confronted with a restive work force, management sought to diffuse the tension—and thereby preserve its control—by unilaterally creating a set of ad hoc Action Committees whose employee members were selected by management and who were instructed by management to represent their fellow employees with respect to certain issues that management chose to address. Management decided what these committees would do, when they would meet, and how they would function. And when the employees sought to form a labor union to represent them, management expressly pitted its "Action Committees" against the union.

Not surprisingly, the NLRB—all of whose members were appointed by President Bush—unanimously found that the Action Committees were employer-dominated labor organizations and hence unlawful. The United States Court of Appeals for the Seventh Circuit unanimously affirmed the NLRB's decision. And, the employer elected not to seek review of the appellate court's decision in the Supreme Court.

Despite all the hype surrounding Electromation, then, the truth is—as the NLRB and Seventh Circuit went to great pains to point out in their decisions and as a few management attorneys have candidly acknowledged—that the case had nothing to do with work teams, quality circles, or any of the other form of legitimate employee involvement that are supposedly under legal attack and that S. 295 would "save" from that attack. What was at issue in Electromation—and all that was at issue—was an old fashioned company union, no different than the councils and committees which employers created and controlled prior to 1935.

2. This discussion of Electromation brings me to the second question S. 295 itself poses: would the bill continue the necessary protection against unfair employer practices. The answer is no. S. 295 would allow employers to do precisely what the employer in that case did: to create company unions as a means toward maintaining total management control and avoiding genuine workplace change.

By its terms, S. 295 would permit employers to "establish, assist, maintain [and] participate in" employee organizations. In other words, the bill would recognize an at-will management right to create employee organizations and representation plans that deal with the employer on wages and working conditions. Each such organization or plan would exist solely at management's sufferance. For each such employee organization or plan it chooses to create, management would have carte blanche to establish the organization's mission and jurisdiction; determine the organization's governing structure and operating procedures; write the organization's bylaws; and, most importantly, select the employees' representatives.

The legislation, simply stated, returns to employers everything they had in the 1920's and 1930's that enabled them to create and dominate employee organizations with one exception: under this bill, the employer could not enter into a written agreement with an entity the employer created. But the authority to sign agreements is in no sense a requisite for a company union; few of the company unions in the 1930's claimed such authority. Indeed, if anything the "limitation" in the bill tilts it further in the employers' favor. It does so by giving employers that create employer-dominated employee organizations every excuse for not signing legally-enforceable and binding agreements with their employees and every right to make "deals" with the employees that the employer can negate with impunity at any time it is convenient to do so.

Equally to the point, S. 295 applies not only to unorganized workplaces but also to unionized workplaces. This bill thus would permit employers whose employees have democratically elected a union to be their representative to bypass the chosen union and deal directly with employee representatives hand-picked by the employer on subjects that lie at the heart of the collective bargaining process. The employer could even create and fund a rival organization to the union and treat with that rival more favorably than with the elected union. The bill would thus create an opening for unionized employers who wish to escape from the collective bargaining process by destabilizing the union and the collective bargaining relationship.

S. 295, then, would deprive union and non-union employees alike of the present law's assurance of being represented by their own, independent representatives—chosen by and accountable to the employees and only to them—in dealing with their employer with respect to the terms of their employment. The bill thus contravenes a core principle of representational fairness that is fundamental to our political and legal systems: in a democracy we choose our own representatives and do not have others who may have different interests do so for us.

3. In closing, one final point needs to be made. Although the proponents of S. 295 have wrapped themselves in new-age rhetoric, in truth what is being proposed is an old, tired idea.

The advance management thinking sixty years ago, when the NLRA was enacted, as Arthur Young of U.S. Steel told the predecessor of this Committee, was that "the human factor is the factor of greatest importance in industry." The 1935 manager professed the desire to "progress towards complete cooperation," to eliminate "remaining areas of conflict," and to achieve a "work relationship . . . of associates jointly interested in a common enterprise for their mutual advantage."

But despite all the talk of "cooperation"—or, to use the current lingo, "involvement"—the constant has been management's desire to reserve for itself complete and total authority to decide unilaterally how much employees will be paid and to determine unilaterally other terms of employment. While managers talk "employee empowerment," managers practice unilateral control when it comes to these core subjects, and the last thing management wants is to deal with an "empowered" work force on these issues. Rather, management today seeks what it has always sought from the Congress: the freedom to "involve" employees in ways that do not threaten management prerogatives. Management wants, in short, to be free to create and control employee organizations and employee representation plans.

In the 1930's these were called "American plans" and the specific institution that management championed was generally termed a "works council." Today, the labels are different. But the essence of what is being sought remains the same: a managerial freedom to preserve existing, hierarchial relationships by creating the illusion—but not the substance—of joint decision making.

Indeed, even the language of S. 295 parallels old and discredited proposals. In 1947 the House passed the Hartley bill which provided—as does S. 295—that an employer's actions in "forming or maintaining . . . a committee of employees and discussing with it matters of mutual interest" shall "not constitute or be evidence of an unfair labor practice." The only difference of note between the Hartley bill and S. 295 is that the former applied only "if the Board has not certified or the employer has not recognized a representative as (the employees') representative" whereas S. 295 applies both to unorganized workplaces and to unionized workplaces as well.

The more limited Hartley proposal was of course rejected by the Senate on the grounds that it went too far in the wrong direction.

The judgment that Congress made in 1935 and reaffirmed in 1947 remains as valid—and as vital—today as it was then. Employer-controlled employee representation stands in the way of authentic worker voice and legitimate employee involvement. Such employer control is, in truth, and should remain in law an unfair labor practice.

PREPARED STATEMENT OF GLORIA T. JOHNSON

The Coalition of Labor Union Women (CLUW) appreciates the opportunity to express its views on S. 295, the Teamwork for Employees and Management Act (TEAM). CLUW is an AFL-CIO affiliate of over 20,000 union members, a majority of whom are women. For more than 20 years, CLUW has advocated on behalf of its women members as well as the millions of American women in union and non-union workplaces. CLUW has been in the forefront in promoting affirmative action, pay equity, health care and child care options, economic equality, family and medical leave, and in conducting programs addressing sexual harassment, workplace violence, and women's reproductive rights and health issues. Through its 75 chapters across the United States, CLUW has taken a leading role in the battle to end discrimination against women and minorities and to ensure fair and safe working conditions for all workers.

CLUW's officers and members represent a broad range of unions, and work in diverse industries and occupations. However, CLUW has played an active role in both unionized and non-unionized employment settings. It is that role which gives CLUW its unique perspective on the crucial workplace issues that will be affected by S. 295. CLUW members support improvements in labor-management cooperation. Unfortunately, S. 295 will not truly serve such laudable objectives. Instead, it will further erode the rights of employees to achieve better working conditions through collective action, rights that have long been guaranteed by the National Labor Relations Act.

Working conditions for most U.S. workers today are not improving. This regrettable fact has a particularly dramatic effect on women who frequently find themselves at the bottom of the economic ladder, often without the most basic protections and benefits that more fortunate members of our society take for granted. While women make up half of today's work force, they hold nearly 80% of our lowest paying jobs. The wage gap remains, with women earning 71 cents for every dollar earned by a man. African-American women are disproportionately represented in jobs at the bottom end of the salary scale. Women earning the lowest incomes are often the sole support for their families. Nearly two-thirds of the women who work have children under 18, yet most employers do not offer them child care benefits. Almost nine million working women—and one in five single mothers—do not have health insurance. Less than half of working women are able to take advantage of the Family and Medical Leave Act because they work for employers with fewer than 50 employees. Less than 40% of working women in 1990 were included in a pension plan, and most women who retire with a pension receive substantially lower benefits than men.

As of 1993, only 15% of women working in the United States were represented by unions. Unionized women workers, however, earn more and have better employment benefits than those who do not have collective bargaining representation. An increasing number of jobs have become "contingent"—of 18 million jobs created in the past decade, 20% are part-time or temporary jobs. Two-thirds of these workers are women. Contingent workers have even less likelihood of receiving health care, pension or other crucial benefits. And, they are paid only 60% of full-time wages. These statistics[1] offer dramatic proof that working women have a greater need than ever to rely upon established statutory protections when they try to organize for better wages, hours and working conditions.

The protections offered by Section 8(a)(2) of the National Labor Relations Act often make a critical difference to workers trying to organize for better benefits, as well to those who already have union representation. In essence, Section 8(a)(2) ensures a level playing field between management and employees.Employers cannot "dominate or interfere with the formation or administration" of any employee organization that deals with the employer about the employees' terms and conditions of employment. This provision ensures that employees can freely select their bargain-

[1]The statistics cited here are based on data compiled by the U.S. Bureau of the Census and the Bureau of Labor Statistics, as presented in 1994-94 Profile of Working Women, published by 9to5, National Association of Working Women (Cleveland, Ohio 1995)

ing representatives and be secure in the knowledge that those representatives will act in their interests, free of any coercive or divisive influence by their employer.

Since its enactment in 1935, and its reaffirmance in 1947, Section 8(a)(2) has prevented employers from setting up "company unions"—organizations that act for "employees" in name only, and are in fact management tools to divide workers and dilute their bargaining power on key issues of wages, working conditions and benefits. Section 8(a)(2) does not prevent, or even inhibit, cooperative labor-management efforts to make the workplace more efficient or productive. In fact, more than half of America's workplaces currently include "team" programs of various kinds which enjoy the support and involvement of employees at many levels. Most workers welcome an opportunity to participate meaningfully in employment decisions affecting what they do and how they do it. Section 8(a)(2) was not adopted to prevent these opportunities, nor has it been interpreted by the National Labor Relations Board or the courts in that manner.

The conduct that has been the target of Section 8(a)(2), as most recently analyzed in the Electromation case,[2] involves an employer's unilateral establishment of employee "committees" to "negotiate" for the employees on key issues of benefits, wages and working conditions. The members of these groups are handpicked by the employer and directed to take positions that advance the employer's interests. Efforts by employees to form unions or negotiate independently are thwarted, leaving employees deprived of their right to speak out and make honest choices about matters central to their working lives. Whenever the NLRB has been confronted with cases involving such "company unions," it has found them unlawful. However, there have not been many of these rulings since Section 8(a)(2) was passed—strong evidence of the value of this provision. Moreover, the Board has never found that legitimate worker-management cooperation teams raised Section 8(a)(2) issues.[3]

The bitter truth is that the motivation behind S. 295 lies not in improving opportunities for worker-management cooperation, but in allowing management to intimidate and divide its workers so that they cannot effectively improve their wages, hours and working conditions. CLUW regularly hears from working women who want to be represented by unions, and have worked tirelessly to organize their workplaces to take advantage of the better working conditions afforded by union representation. In fact, women today are far more likely to work actively on union organizing campaigns than in the past. And, as the statistics noted above demonstrate, these women are in increasing need of the protections afforded by collective bargaining negotiations.

These women face many obstacles in their struggle for an effective voice on issues which are statutory subjects of bargaining. They begin these union organizing efforts knowing that the employer wields substantial power and influence over their lives and their choices, even in the absence of employer-dominated "unions." Many of these women recount "horror stories" about their employer's anti-union campaigns. They speak of their fears, and those of their co-workers, that they will simply lose their jobs if they fight too hard for equalized bargaining power. And, many of these women are fired! Even when unfair labor practice charges are filed in connection with grave employer misconduct during organizing campaigns, resolution of those charges often takes so long that any victory is purely illusory. Employees who were active in the organizing campaign have been removed from the workplace. Others become too intimidated to continue. Others are persuaded by employer campaigns to vote against the union. As these long battles drag on, and even after they conclude, many workers end up losing faith in our nation's stated commitment to the collective bargaining process. Such problems exist, in part, because of the unequal bargaining power between unorganized workers and management. Section 8(a)(2) has been one method of holding this power in check.

S. 295 would apply in both union and non-union settings. It would enable employers to create organizations to by-pass democratically elected union representatives, as well as increase the odds against successful union organizing campaigns. While the proposed legislation claims that "legitimate" employer sponsored programs have not been established to "avoid unionization," as was the case in 1935 when Section 8(a)(2) was passed, the legislation contains no guidelines of any kind to guard against just such a result. So long as the employer created and dominated organiza-

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[2] Electromation, Inc., 309 NLRB No. 163 (1992), enf'd, 35 F.3d 1138 (7th Cir. 1994)

[3] See, James Rundle, "The Debate Over the Ban on Employer Dominated Labor Organizations: What is the Evidence?," Restoring the Promise of American Labor Law (ILR Press, Cornell University 1994) (pointing out that there have been less than three cases per year in the past 22 years that have required an employer to disband employer-dominated groups, most of which also involved other serious violations of employee organizing rights such as coercive conduct and discharge).

tion does not "have, claim or seek authority to negotiate or enter into collective bargaining agreements" or to "amend existing collective bargaining agreements," it is lawful. It does not require a crystal ball to imagine how easy it will be for an employer to adhere to this requirement, while accomplishing the result of avoiding or weakening effective unionization.

In considering the value of employee-management "cooperation," it is important to recall the important values served by the collective bargaining process. That process is based upon fundamental principles of democracy and freedom of choice. Employees who speak collectively, free of employer control or influence, are able to organize and bargain for better wages, greater benefits and safer and more worker-friendly conditions of employment. These employees are more likely to support worker-management cooperation programs because they already know that their employer values their opinions and seriously considers the positions they express. If we are serious about furthering competition and improving the economy, we will work to strengthen the protections provided by our labor laws, not dilute them with legislation such as S. 295. Rolling back sixty years of protection against "company unions" will harm, not promote, an atmosphere of cooperation, equity and partnership in the workplace.

Workshop On The Potential Impact Of Alterations To Section 8(a)(2) On Unions And Union Organizing Campaigns

(Charles J. Morris)

As we know too well, in politics the perception of reality is more important than reality itself. That is why Section 8(a)(2) is in danger. The perception of the Electromation[1] case is that it concerned employee participation and team concepts and therefore the Board's decision has had a "chilling" effect on such programs, thereby threatening American competitiveness in the world market. The reality of Electromation was that the only issue before the Board was a watered-down employee negotiating procedure which the employer had unilaterally created to deal with a limited number of mandatory subjects of bargaining. This procedure consisted of five so-called "action committees" that were imposed upon its employees' without their consent. In the words of Board Member Devany, that procedure "gave employees the illusion of a bargaining representative without the reality of one."[2] Neither the action committees nor any other facts in the case concerned employee teams or worker participation in the production process. Affirming the Board's decision, a unanimous panel of the Seventh Circuit Court of Appeals spelled out the elements of the company's unlawful conduct,[3] thereby emphasizing that the real issue in the case concerned the fundamental right of employees to choose for themselves which labor organization, if any, will represent them in dealing with their employer regarding traditional subjects of bargaining. That is the right which Section 7 guarantees to all employees covered by the Act. Electromation thus involved the core principle of the statute.

The company played a pivotal role in establishing both the framework and the agenda for the action committees. Electromation unilaterally selected the size, structure, and procedural functioning of the committees; it decided the number of committees and the topic(s) to be addressed by each . . . Electromation actually controlled which issues received attention by the committees and which did not. [I]t unilaterally determined how many could serve on each committee . . . and determined which committees certain employees would serve on, thus exercising significant control over the employee's participation and voice . . .

Also, the company designated management representatives to serve on the committees . . . effectively put[ting] the employer on both sides of the bargaining table, an avowed proscription of the Act . . . Finally, the company paid the employees for their time spent on committee activities, provided meeting space, and furnished necessary supplies . . . 63 U.S.L.W. at——.

But notwithstanding the Seventh Circuit's carefully reasoned opinion, the well-orchestrated opposition to Electromation has ignored the reality of the case, choosing instead to propagate a campaign of fear and misinformation about the decision, charging that it has had a chilling effect on worker participation plans, thereby endangering the competitiveness of American industry.[4] No hard evidence has been

[1] 309 NLRB 990 (1992), aff'd, 63 U.S.L.W. 2174 (7th Cir. Sept. 15, 1994).

[2] 309 NLRB at 1003.

[3] The court's opinion stated:

[4] E.g., see the following: "Consensus position" of a "Working Group" of management attorneys (Vincent J. Apruzzese, Charles G. Bakaly, Jr., Robert S. Carabell, William J. Curtin, William Kilberg, Charles A. Powell III, and Ezra Singer) presented to the Commission on the Future

advanced to support that charge;[5] whereas there is abundant anecdotal evidence to dispute it.[6]

It is easy to understand why the nonunion management lobby is so upset by Electromation, and it is not because the case chills "worker participation" or any meaningful concept of "employee cooperation." Those are simply nice buzz words which mask the real concern, which is that something else might be chilled, because Electromation has focussed attention on what used to be the best kept secret under the National Labor Relations Act: Section 8(a)(2). As a result of Electromation and its progeny,[7] that section has suddenly become the Achilles Heel of nonunion employer conduct under the Act. Employers long ago learned how not to fear the NLRB or the Act, especially its better known provisions, Section 8(a)(3) relating to discharges for union activity,[8] and Section 8(a)(5), relating to the duty to bargain in good faith.[9] They learned that the Act could even be used as a buffer against unionization, and that the NLRB, at worst, was but a minor irritant to an employer who was doggedly determined to maintain a nonunion environment.[10] But now the Board shows signs of enforcing a potent provision of the Act which most employees, especially nonunion employees, didn't even know existed.

In recent years, prior to Electromation, Section 8(a)(2) was only rarely enforced; in fact, unions typically filed 8(a)(2) charges only in the aftermath of an unsuccessful organizational campaign.[11] And a well designed and properly maintained company union, which was likely to be called by an attractive euphemism, such as "Equity Committee," "Progress Committee," "Employee Company Relations Committee," or "Action Committee," could generally be relied upon to discourage employees from supporting any organizational campaign mounted by an outside union.

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of Worker-Management Relations (hereinafter the "Dunlop Commission") on Jan. 19, 1994: "Electromation and its progeny have had a chilling effect on employers' willingness to initiate and/or continue employee participation committees, at the very time these committees have become widely recognized as a major means of improving productivity and enhancing product quality. Electromation must be clarified or changed to assure continued employee participation." (Contained in Daniel V. Yager's statement to the Commission.) Jeffrey McGuiness, president of the Labor Policy Association, without mentioning the Seventh Circuit's affirmation, recently characterized Electromation as the NLRB's "dumbest decision." 222 Daily Lab. Rep. (BNA) D-10 (Nov. 21, 1994).

[5] None was presented to the Dunlop Commission. E.g., the Survey conducted by Aerospace Industries Association, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, & Organization Resources Counselors, Inc., submitted to the Commission on August 10, 1994, contains no such data.

[6] E.g., Jerome Rosow, president of the Work in America Institute, a non-profit group that promotes employee participation, observed that although "[s]ome companies are going to have to clean up their act . . . most will find ways to work within the labor laws;" according to Ned Hamson, an official of the 10,000-member Association for Quality and Participation," despite the hoopla and uncertainty, companies apparently are not scuttling their labor-management committees," most companies "are following the guidelines they have always used;" and USA Today reported that quality experts say they doubt the NLRB's rulings will bring the quality movement to a screeching halt. USA Today, June 8, 1993, 6B. See also discussion at notes 17-21 infra.

[7] Since Electromation, the Board has found §8(a)(2) violations in the following cases: Ryder Distribution Resources, Inc., 311 NLRB No. 81 (May 28, 1993); E.I. DuPont & Co., 311 NLRB No. 88 (May 28, 1993); NCR Corporation, a Subsidiary of AT&T, Case No. 9-CA-30467 (July 15, 1994); Prime Time Shuttle International, Inc., 314 NLRB No. 139 (Aug. 24, 1994); Megan Medical Clinic, Inc., 314 NLRB No. 173 (Sept. 12, 1994). The following §8(a)(2) cases are pending at the Board level (i.e., ALJ Decisions have issued): Keeler Brass Automotive Group, Case No. GR-7-CA-32185; Webcor Packaging, Inc., Case Nos. 7-CA-31809 & 31896 & 7-RC-19513; Stoody Company, Div. of Thermadyne, Inc., Case Nos. 26-CA-15425, 15428, & 15521; Dillon Stores, Div. of Dillon Company, Case No. 17-CA-16811; Vons Grocery Co., 21-CA-29084-86 & 29202.

[8] E.g., Morris, The NLRB in the Dog House—Can an Old Board Learn New Tricks?, 24 San Diego L. Rev. 17-22 (1987).

[9] E.g., W. Cooke, UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS (1985); Dunlop Commission FACT FINDING REPORT 73-74 (1994).

[10] See FACT FINDING REPORT of the Dunlop Commission (May 1994) at 66-78.

[11] Comprehensive review of all published decisions under Section 8(a)(2) prior to Electromation reveals that in each case the charge was filed ancillary to a union organizational campaign. See also Rundle, The Debate Over the Ban on Employer Dominated Labor Organizations: What is the Evidence (paper submitted at AFL-CIO/Cornell Univ. Conf., 1993), indicating the same conclusion, based on a LEXIS search, for the period from 1972 to 1993. Rundle's research also indicated that in almost all of the cases prior to Electromation in which the Board ordered disestablishment of the employer-dominated entity, the employer was found guilty of other unfair labor practices in addition to §8(a)(2): "Typical of the ULPs were interrogations, threats to shut down and layoff, surveillance, discriminatory discharge, soliciting grievances, and granting improvements." Id.

As a result of the scant attention paid to Section 8(a)(2), including the lulling-effect of two unsound NLRB holdings, John Ascuaga's Nugget[12] and Mercy-Memorial Hospital[13] which slipped through the cracks in 1977 when they were not submitted for judicial review, an untold number of employers have confidently maintained a variety of employee committees and plans[14] that patently violate Section 8(a)(2), the most conspicuous examples being the long-established plans at the Polaroid Corporation[15] and at the Donnelly Company,[16] both of which are now the subject of cases pending at the National Labor Relations Board. These and plans like them, as well as certain nonunion grievance plans, including so-called "peer review"[17] and "ombudsman"[18] type plans, are now at risk because of the publicity attached to Electromation.

The features of such plans that violate the statute do not involve worker participation in the work or production process, for the Board held in General Foods[19] that such a plan is not a labor organization within the meaning of Section 2(5); thus, high performance nonunion participation plans like the ones described to the Dunlop Commission by Texas Instruments, Inc.,[20] and Toyota Manufacturing, USA,[21] Inc. appear to be perfectly legal. And employee communication plans designed for legitimate communication, not for sham collective bargaining, are likewise not at risk, for the Board found such a plan to be lawful in its Sears Roebuck[22] decision. As Edward Miller, distinguished management attorney and former Chairman of the Board, told the Dunlop Commission, "an employer who really wants to, with assistance from good legal advice and counseling, can implement a very worthwhile employment involvement program and stay within the law."[23] He stressed that "[i]t is indeed possible to have effective programs of this kind in both union and nonunion companies without the necessity of any change in current law."[24] And he also had the integrity to tell the Commission: "While I represent management, I do not kid myself. If Section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur."[25]

Regrettably, other management spokespersons on this subject have not been so candid, for it is obviously easier for them to sell an anti-(8)(a)(2) campaign if the public views that provision not as a shield against sham company unions but as an archaic impediment to worker cooperation and therefore a danger to American competitiveness. And that is exactly how the effort to repeal Section 8(a)(2) is being sold. It is the perception of reality that they are selling. The present actual reality is that legitimate nonunion worker participation programs are not being chilled. And the likely future reality as to what will happen if Section 8(a)(2) is repealed—aside from the obvious negative impact which that would have on union organizing—is that the-resulting legislative void would dampen some of the best efforts at employee-management cooperation, and the competitiveness of much of American industry could be adversely affected in the long run. I shall highlight some of these prospects later in this presentation.

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[12] 230 NLRB 275 (1977), holding that an employees' grievance committee composed of the company's director of employee relations, an elected employee representative, and another representative of management was not a labor organization within the meaning of §2(5).

[13] 231 NLRB 1108 (1977), holding that an employees' grievance committee, created by the employer, composed of elected employees with three years of seniority and also a representative of management was not a labor organization within the meaning of §2(5).

[14] See, for example, numerous such plans described in the following books: David W. Ewing, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE (Harvard Bus. Sch. Press, 1989); Douglas M. McCabe, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS, A STRATEGIC HUMAN RESOURCES MANAGEMENT ANALYSIS (Praeger, 1988); Alan F. Westin & Alfred G. Feliu, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (BNA, 1988);Fred K. Foulkes, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES (Prentice-Hall, 1980); James R. Redeker, EMPLOYEE DISCIPLINE: POLICIES AND PRACTICE, (BNA, 1989).

[15] See NLRB Consolidated Complaint pending in Polaroid Corporation, 1 CA-29966; 1 CA-30063; 1-CA-30211, scheduled for trial on Feb. 7, 1995.

[16] See NLRB Charge pending in Donnelly Company, GR 7-CA-36697.

[17] See Keeler Brass Automotive Group, a Div. of Keeler Brass Co., NLRB Case No. GR-7-CA-32185, ALJ Decision issued Oct. 1, 1992, now pending before the Board.

[18] See NLRB v. General Precision, Inc., 381 F.2d 61 (3rd Cir. 1967).

[19] General Foods Corp., 231 NLRB 1232 (1977).

[20] Presentation of Texas Instruments, Inc., to Dunlop Commission on Feb. 11, 1994.

[21] Presentation of Toyota Manufacturing, USA, Inc., Georgetown, Kentucky, to Dunlop Commission on Sept. 15, 1993.

[22] Sears Roebuck &. Co., 274 NLRB 230 (1985).

[23] Miller, Myths and Reality about U.S. Labor Relations, paper submitted to Dunlop Commission, at 6 (Oct. 8, 1993).

[24] Id.

[25] Id. See also 201 Daily Lab. Rep. (BNA) D-7 (Oct. 20, 1993).

Although what is really happening regarding Section 8(a)(2) should be easy to see, I am distressed that some of my academic colleagues in the industrial relations community seem to see nothing; as if they were viewing Section 8(a)(2) with blinders on their eyes. The most recent example of the "blinders" syndrome is to be found in Tom Kochan's and Paul Osterman's new book, THE MUTUAL GAINS ENTERPRISE.[26] That book contains an excellent review and' exposition of high performance workplaces, and it is an important contribution to the literature on the subject. But unfortunately it also contains some untenable conclusions that must not go unchallenged. In fact, the authors specifically invite debate about their ideas,[27] so I am pleased to accept that invitation. What I shall say will be in the nature of a book review; but that is appropriate considering the importance of their conclusions and the relationship of those conclusions to the subject of this presentation.

Kochan and Osterman, whom I shall hereinafter refer to as "K&O," have chosen to see only what they wanted to see in Electromation, not what it really stands for. They assert that Electromation "illustrates" that "over time, the law has lost its ability to provide workers a voice in workplace decisions that have the greatest impact on their long-run economic security."[28] They apparently arrived at that remarkable conclusion not by direct analysis of the case, but rather by a misreading of a report of the case in Business Week[29] magazine and by ignoring the compelling evidence which they themselves document in their book. I shall review some of that evidence later.

First, the Business Week story. It was written by Aaron Bernstein, Business Week's Workplace Editor. He concluded,unlike what K&O reported, that "Employers should take some cues from the NLRB and give employees more say in running teams. [And] if Corporate America is serious about teams—and the results they produce—the Electromation decision need be no more than a healthy midcourse correction."[30] K&O, however, drew a different conclusion, a pejorative one that Bernstein hadn't even suggested, which was "that the conditions [nonunion] employers needed to avoid are essentially those which make teams worth having in the first place."[31] And without supporting facts or analysis, K&O conclude that "the major point that Electromation illustrates is how outdated the current law is and how badly a new one is needed."[32] I fully agree that the law could use better enforcement mechanisms and other improvements; in fact, I have advocated amendments to that effect.[33] Electromation is proof of a statutory success, not a statutory failure. There are many proofs of failure under the NLRA, but Electromation is not one of them. Unless, of course, a person believes that an employer should have the right to dominate and control its employees' collective voice regarding their "wages, grievances, hours of work, or working conditions," which are precisely the words describing the mandatory bargaining items that K&O inaccurately attributed to Bernstein's list of conditions that make "teams" worthwhile for nonunion employers.

In their effort to find a quick-fix for the serious problem American labor law, K&O could not resist their fascination with German works councils. But what they failed to consider is that those employee councils in Germany have functioned so well precisely because their operations are linked to an almost total saturation collective bargaining system[34] which features strong[35] and socially accepted[36] trade unions.

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[26] (Harvard Bus. Sch. Press, 1994).

[27] Id. at 17.

[28] Id. at 201.

[29] Bernstein, Making Teamwork Work—And Appeasing Uncle Sam, Business Week, 101 (Jan. 25, 1993).

[30] Id.

[31] K&O, supra note 26, at 202.

[32] Id.

[33] See Morris, A Blueprint for Reform of the National Labor Relations Act, 8 Admin. L. J.———(1994).

[34] See discussion of the "declaration of general binding" effect of collective agreements in M. Weiss, LABOUR LAW AND INDUSTRIAL RELATIONS IN THE FEDERAL REPUBLIC OF GERMANY (Kluwer, 1987), 128-129.

[35] See Buschmann, Worker Participation and Collective Bargaining in Germany, 15 Comp. Lab. L. J. 26, 28 (1993).

[36] "The role of unions as organizations representing the workers' interests is generally accepted and uncontested in the Federal Republic of Germany. The trade unions are not only factually integrated in society but they have quite a few institutional rights of participation. These rights are not only limited to matters of the labour market but go far beyond this. The unions to a more or less limited extent are integrated on boards dealing with educational and cultural matters, on boards of mass media, in institutions dealing with economic and social security matters, in the system of labour courts and social security courts, to give some idea of the multitude of their activities." M. Weiss, supra note 34, at 118-119.

And because German works councils are not mandatory, they exist mostly in establishments where there is a significant trade union presence among the employees. Furthermore, almost all works counselors are also union members and union sponsored, and the unions work closely with the councils.[37] K&O, however, are of the opinion that a works council, or something like it, could function successfully in the United States without a union presence. But the historical record indicates otherwise, as I shall demonstrate shortly. Tom Kohler's comment on the phenomenon of an employee participatory entity unrestrained by the restrictions of Section 8(a)(2) aptly sums up the prospect. He said that although a lot has changed during the nearly sixty years that have intervened since the Act's passage . . . [t]he one thing that remains constant. is human character . . . By striking off in an entirely different direction, we will be attempting to do something that no one else in the world has been able to achieve: make participative devices function without some form of autonomous employee body to ground them.[38]

Without intending to do so, K&O supply us with an excellent example of Kohler's thesis. They entitle that example "'Works Councils' in America: The Case of Polaroid,"[39] for which they offer a laudatory and lengthy exposition of a "value system" at the Polaroid Corporation that operated in conjunction with an employee governance device called the Employees' Committee. As described by K&O, "Representatives were elected by employees, and the committee discussed the full range of the company's personnel policies, although it had no formal authority to make decisions."[40] But as K&O illustrate, the Committee sometimes was able to obtain an agreement from the company on an employment policy issue.[41] Thus, the Committee and the company dealt with each other concerning mandatory bargaining subjects. But K&O's description of employee participation at Polaroid does not include employee participation in the process of production, although that may also have occurred. What they describe is simply a classic example of an old-fashioned company union, which in this instance had already been declared illegal by the Department of Labor because of its violation of the democratic election requirements of the Landrum-Griffin Act,[42] and an NLRB unfair labor practice trial is scheduled next month regarding its legality under Section 8(a)(2).

The Polaroid example demonstrates the working of the human character to which Professor Kohler referred. Had K&O delved a little deeper, they would have discovered that the Polaroid Employees' Committee was so organized that the company was able to maintain effective control over its operations. The Chairman and Vice-Chairman of the Committee, who dealt directly with the CEO, were well paid by the company for their full-time activities on behalf of the Committee, and they in turn were elected by the members of the Committee whose regular compensation in turn was augmented by overtime payments which were authorized and approved solely by the Chairman of the Committee.[43] This was the tightly controlled inner-circle that prompted Charla Scivally, an elected Employees' Committee member, to blow the whistle in 1992 on both the company union and Polaroid.[44]

But K&O apparently saw no evil in the Polaroid process, or even an ethical conflict. Instead, they advise us that the "ultimate lesson" of the Polaroid experience is that "we are unlikely to see this form of employee participation in corporate governance on a meaningful scale in the United States unless it is sanctioned by

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[37] Addison, Kraft, & Wagner, German Works Councils and Firm Performance, in Bruce E. Kaufman & Morris M. Kleiner, eds.,EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS, 305, 310 (1994). See also Buschmann, Worker Participation and Collective Bargaining in Germany, 15 Comp. Lab. L. J. 26 (1993).

[38] Kohler, The Overlooked Middle, in M. Finkin, ed., THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION (ILR Press, 1994) 224, 241. Professor Kohler added: "We will be doing more as well. We will be giving public sanction to yet another turn away from one of the institutions that grounds the middle [Kohler's reference to the centrality of employment]. It may be more prudent to inquire in the other direction and to ask what sorts of steps we can take to sustain and restore those crucial . . . autonomous employee bodies. Problems rarely are solved by furthering the types of actions that brought the problem on in the first place." Id.

[39] K&O, supra note 26, at 137.

[40] Id., at 138.

[41] Employee share of Eastman Kodak patent-infringement settlement. Id.

[42] 29 U.S.C. §481. See Polaroid Dissolves Employee Committee in Response to Labor Department Ruling, 121 Daily Lab. Rep. (BNA) A-3 (June 23, 1992).

[43] See affidavits and other exhibits on file in Scivally v. Craney, et al, U.S. Dist. Ct., Dist. of Mass., No. 92-11688-2. Anne Leibowitz, Polaroid's corporate labor counsel, acknowledged in a formal panel discussion at Cornell Journal of Law & Social Policy Symposium on Employee Participation Plans, in Ithaca, New York, on April 30, 1994, that the company never questioned the overtime reports submitted by the Chairman of the Employees' Committee. See Video tape transcript of that symposium.

[44] Id.

changes in labor law."[45] The changes they favor, as we shall see, would allow Polaroid to reestablish its defunct Employees' Committee.

Although K&O assert that the Polaroid Committee "functioned very much like an equivalent of a German works council,"[46] I fail to see any resemblance.[47] K&O were obviously looking in the wrong place for an example of an American counterpart to a German works council; they could have found such an example from among the unionized companies in the integrated steel industry. To illustrate: Using traditional collective bargaining, Inland Steel and the United Steelworkers in 1993 arrived at a level of employee participation that includes union representation and input at all levels of corporate decision-making, full and early disclosure of business and financial information, and a union designated member siting on the corporate board of directors. The name of that director, incidentally, is Bob McKersie, a distinguished member of this Association.[48]

In contrast to the Inland Steel experience, K&O present us with various versions of what they consider to be viable forms of an Americanized works council,[49] all of which, however, would discourage the presence of an independent union. The version which they seem to favor is one that appears to be identical to the bills introduced in the Congress last year by Senator Kassebaum[50] and Congressman Gunderson.[51] Those bills would effectively repeal Section 8(a)(2).[52] K&O, however, contend that such legislation would "simply . . . open labor law to allow firms and employees to create voluntarily any new form of participation."[53] Thus, firms "might choose to set up councils for advisory purposes and keep their agendas open to whatever issues are of greatest concern to the parties."[54]

Note the manner in which they repeatedly refer to the parties in a nonunion setting, as if unorganized employees have a coherent identity and the capacity to speak independently with a unified voice. For example, they see their proposal as a means to "encourag[e] the parties to experiment with new types of participation and representation in the labor movement, in other employee groups that provide support for these councils, or in the business community."[55] Translated, "parties" in such a nonunion environment actually means the "employer" acting unilaterally, though sometimes that action might occur behind the scenes and overtly appear to be employee action. K&O seem to have forgotten: Just as it takes two to tango, it takes two identifiable partners to engage in meaningful cooperation. Thus, it is no accident that the real success stories of innovative cooperation in the American workplace, as exemplified by the many companies that K&O identify for the purpose of illustrating "mutual gains enterprises," are those which have been created at unionized companies through the process of collective bargaining.

The nonunion management lobby, however, appears to be more interested in maintaining union-free operations than maximizing employee productivity through genuine cooperative programs, for the Kassebaum/Gunderson bill would do nothing to advance employee participation in the work process. Despite its packaging, the text of the bill gives employers no real incentive to create such participatory programs. On the other hand, the bill does provide a legal means to create buffer em-

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[45] K&O, supra note 26, at 139.

[46] Id., at 137.

[47] There are many critical aspects of German works councils lacking in the Polaroid plan. To note just a few: A German works council does not deal with basic rates of remuneration, for these are handled by collective bargaining; the company is required to supply the council with early and detailed information and documentation about a wide variety of subjects, including future business plans; the counsel has an independent right to call on the advice of outside consultants; and the council's consent is required for policy changes relating to recruitment, transfers, regrading, and dismissals. See Buschmann, supra note 37.

[48] See discussion and sources in C. Morris, From Crisis to Cooperation: A New Direction in Industrial Relations, 180 Daily Lab. Rep. (BNA) D-1, D-5-7 (Sept. 20, 1994).

[49] K&O, supra note 26, at 204-207.

[50] S. 669, 103rd Cong., 1st Sess., introduced March 3, 1993.

[51] H.R. 1529, 103rd Cong., 1st Sess., introduced March 30, 1993.

[52] The only company unions that would henceforth be outlawed would be those foolish enough to label or identify the product of their discussions or dealings with the employer as a "collective bargaining agreement," for §3 of both bills allow employers to "establish, assist, maintain or participate in any organization or entity of any kind, in which employees participate [so long as such organization or entity] does not have, claim or seek authority to negotiate or enter into collective bargaining agreements . . ."

[53] K&O, supra note 26, at 205 ("second option").

[54] Id.

[55] Id..

ployee committees that would discourage the organization of independent unions.[56] Such committees provide a benign mechanism that permits carefully limited employee participation, even representation, in the setting of "wages, hours, and other terms and conditions of employment," the mandatory bargaining subjects defined in Section 8(d) of the Act. If this bill were to become law, Electromation type action committees would again become legal. And such highly visible company unions as those that have been challenged at Polaroid and Donnelly, and others like them, would also be legalized. I link the Polaroid and Donnelly plans because each has been boastfully presented by its creator company as an especially effective medium for channeling employee expression. Polaroid so boasted to K&O, and Donnelly so boasted to the Dunlop Commission.[57]

The only difference between the K&O proposal and the Kassebaum/Gunderson bill is that K&O combine their 8(a)(2) recommendation with other labor law reforms which they believe would make it easier for unions to organize and achieve first bargaining contracts.[58] But, as we all know, none of those reforms have the slightest chance of passage in the foreseeable future. But this will not keep proponents of Kassebaum/Gunderson or other anti-Section 8(a)(2) bills from using Kochan's and Osterman's endorsement, and probably similar stands by other academics, to provide a cover of respectability for their single item 8(a)(2) amendment. That is why it is so important to critically examine the Mutual Gains Enterprise and not rush to confer the usual accolades that its authors most often deserve.

Lest there be any doubt about what will happen if the Gunderson/Kassebaum bill should pass, history supplies the answer. Not surprisingly, it is the same answer Ed Miller gave us earlier, that "in not too many months or years sham company unions [will] again recur."[59]

It is unfortunate that K&O's treatment of the history of company unions omits key data from the same historical source on which they purport to rely. They cite Millis & Montgomery[60] as primary authority for their assertion that employee representation plans [were] established after World War I by companies partly to ward off union organizing . . . But gradually over the course of the 1920s their growth tapered off [and] the Great Depression dealt another blow to these efforts. 'Company unions' were then outlawed by the passage of the National Labor Relations Act, which served as the final nail in the coffin of the employee representation or American Plan movement.[61]

Of course, as we now know too well, Section 8(a)(2) was not the final nail in that coffin, for, as Electromation, Polaroid, and Donnelly illustrate, company unions continued to flourish, and many of them are still functioning. But more important for historical purposes is the fact that K&O omit entirely, as if by way of psychological denial, all references to the critical three-year period that immediately preceded passage of the NLRA and Section 8(a) (2), for that was when company unions and employee representation plans reversed their decline and actually multiplied faster than independent unions. As Millis & Montgomery noted, during that short period of time, "company union coverage increased from approximately 40 per cent to almost 60 per cent of the estimated trade union membership."[62] That period thus provides an uncanny preview of what is likely to happen should Congress issue a legislative license to employers to create unregulated employee-representation committees. For such an invitation had been extended in 1933 by passage of the well-in-

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[56] To demonstrate how such plans, even without the blessing of legality, have been used in the past for union avoidance purposes, see: D. Ewing, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE (Harvard Business School Press 1989) at 7, 14, 104-105, 242-43, 282; D. McCabe, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS, A STRATEGIC HUMAN RESOURCES MANAGEMENT ANALYSIS (Praeger 1988) at 22-29, 41-43; A. Westin and A. Feliu, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (BNA 1988) at 117, 129-43; F. Foulkes, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES (Prentice-Hall 1980) 281-93; J. Redeker, EMPLOYEE DISCIPLINE: POLICIES AND PRACTICE, (BNA 1989) at 129.

[57] See testimony and exhibits presented by Kay Hubbard, Advocate for Human Resource Development at Donnelly Corporation, to Dunlop Commission, Oct. 13, 1993, Tr. 55-77. See also Ewing, id., at 205.

[58] Although those changes are not the focus of this presentation, I would not want their omission to appear to imply approval. Were this a full review of The Mutual Gains Enterprise book, I would seek to demonstrate that notwithstanding the good intentions that prompted them, a number of those changes would worsen rather than improve the law. See K&O, supra note 26, at 199-212.

[59] Supra note 25.

[60] H. Millis & R. Montgomery, ORGANIZED LABOR (McGraw Hill, 1945).

[61] K&O, supra note 26, at 98.

[62] Millis & Montgomery, supra note 60, at 841, citing National Industrial Conference Board source.

tended but infamous Section 7(a) of the National Industrial Recovery Act.[63] Here is what Millis & Montgomery wrote about that early New Deal legislation, which K&O failed to note:

Section 7(a) of the National Industrial Recovery Act, though designed to protect the right of workers in code industries to organize as and when they might wish, actually stimulated more than it checked the introduction of company unions . . . [M]any employers in no small measure influenced their employees to adopt representation plans, or presented to their employees representation plans they themselves had formulated for approval at meetings or at elections fairly or unfairly held, or imposed plans by mere announcement; furthermore in most cases the employers paid the incidental bills.[64]

And if Kassebaum/Gunderson has not already created a sense of deja vu, listen to what another labor historian said about that N.I.R.A. Section 7(a) period. Foster Rhea Dulles wrote that although employees could not be required to join a company union "their employers were still free to exercise every possible kind of pressure in making it seem advisable. And this was done so effectively, that enrollment in company unions rapidly rose . . ."[65] The historical conclusion is both obvious and familiar: Those who would ignore history are destined to relive it.

A resurgence of company unionism would have an obvious effect that requires no elaboration. It would nip in the bud the revitalization of the American labor movement that has already begun. To their credit, K&O fully recognize that the continued decline of organized labor in America would adversely affect both our economy and our democratic institutions. They give four basic reasons why a healthy labor movement is important to the well-being of the country. First is the value which unions bring to a democratic society.[66] Second is the "distributive economic role that union representation plays, especially for workers at the lower end of the wage scale."[67] Third, "[t]he active partnership of union representatives can be a powerful force for sustaining commitment to workplace innovations."[68] And fourth, "further union decline will impose a high cost on those organizations which are currently organized [so that] over time it will become increasingly difficult to sustain cooperative or innovative activity in existing unionized establishments as labor representatives get backed further into a corner."[69]

Those assessments are very much on target. Unfortunately, however, K&O fail to discern that without the protection of Section 8(a)(2), their dire predictions about the effect of further decline in organized labor will likely come true.

Their own data tell us that the potential impact of such a decline would fall heavily on the very industries that have been the most innovative in instituting employee participation at various levels of decision-making. Accordingly, if the cooperative programs at those industries are replaced by "a self-fulfilling cycle of conflict," which is the K&O reading, the competitiveness of much of American industry will indeed be adversely affected in the long run.

K&O should realize this from their own data. Early in the volume they promise to bolster their argument for the establishment of "mutual gains enterprises" by drawing "on experiences with new forms of participation that have proved their value in specific American workplaces . . ."[70] But when the time comes to identify those workplaces, they describe in considerable detail a number of cooperative programs that have been developed at unionized companies under collective bargaining,[71] but they include only a few short references to programs at nonunion companies, and these raise more questions than answers.[72] Except for brief summaries of employee programs at three small companies that appear to be limited to the work or production process[73] and on at a large company that operates under the Railway Labor Act,[74] they provide no details of innovative programs in nonunion

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[63] 48 Stat. 198 (1933).
[64] Id. at 843.
[65] LABOR IN AMERICA: A HISTORY (Thos. Y. Crowel, 1966) 270-271.
[66] K&O, supra note 26, at 142-144.
[67] Id., at 145.
[68] Id.
[69] Id.
[70] Id., at 17.
[71] For example, Saturn, NUMMI, Boeing, Xerox, Magnum Copper, Corning, Ford Motor, Chrysler, integrated steel companies, AT&T, Levi Strauss, and Harvard University.
[72] The most space is devoted to the Polaroid plan. See notes 39-47, supra.
[73] Chaparral Steel, K&O, supra note 26, at 63; Shenadoah Life Insurance Co., Id., at 64; Rohm & Haas Bayport, Inc. Id at 65.
[74] Federal Express. Id. at 62. The Railway Labor Act does not have a company-union prohibition as expressly restrictive as §2(5) of the NLRA.

environments. So where are the much-touted examples of worker participation at nonunion companies which they seemed to promise? They are not described in the book, though many excellent participatory programs certainly exist in nonunion workplaces. Over the long haul, however, such programs cannot be as productive or as enduring as those in unionized establishments, which is what K&O fully explain but apparently fail to fully appreciate.

K&O begin their analysis of high performance workplaces with four generic principles designed to serve as guidelines for a mutual gains enterprise.[75] Two of those principles, "[e]mployment in problem solving"[76] and requiring a "climate of cooperation and trust,"[77] are illustrated only by examples at unionized establishments. And they tell us that their examination of gain-sharing and profit-sharing reveals "the importance of having a supportive, collaborative arrangement between labor and management [because] these plans seem to work well only if the labor force is given sufficient access to information to be confident that the system is fair."[78] They also note that "[e]mployment participation is unlikely to survive for long in an organization whose business strategies rely primarily on minimizing costs and there is little or no commitment to employment security."[79]

Conclusions such as these seem finally to have convinced K&O of the critical role that unions can and do play in the development and maintenance of innovative work processes, for they grudgingly report that their work has led them to a strong hypothesis, that "the active involvement and support of unions increases the sustainability of the innovation process."[80] I say "grudgingly" because they still are unable to see the forest for the trees.

What the forest they describe really looks like is a place where independent unions are a necessary component of the highest productivity workplaces; certainly that is a common characteristic of almost all the trees in this forest, at least all of the most impressive and durable trees. So for reasons which are now well-documented, high productivity and sustainability can best be found in unionized establishments on account of two main factors: (1) shared decision-making can legally embrace both methods of production and conditions of work, including genuine due process grievance procedures;[81] and (2) an atmosphere of mutual trust and confidence, which includes reasonable employment security, is a necessary ingredient if employees are to have maximum incentive to contribute innovatively to the work or production process.[82]

Hope springs eternal. Perhaps Kochan and Osterman will eventually see the forest. And when the do, they may also see the potential which retention and enforcement of Section 8(a)(2) can bring to a newly revitalized labor movement. Now more

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[75] Id at 46-52

[76] Id at 49-50 (NUMMI and Saturn).

[77] Id., at 51-52 (Xerox and Saturn).

[78] Id., at 74. See also 103, where K&O note that the available data suggest "that if employment security is critical to workplace innovation, it either has to come from someplace other than the policies of individual firms or individual firms have to manage their resources in a significantly different way."

[79] Id at 59.

[80] Id., at 105.

[81] Because the latter conditions are statutory subjects governed by §§2(5) and 8(d) of the National Labor Relations Act, they can be legally dealt with between employers and groups of employees only where such groups are voluntarily selected by the employees and not controlled by the employer. As Eileen Appelbaum has noted, on the shop floor "it may be difficult to separate discussions of process improvements from discussions of job assignments and conditions of work, or discussions of quality training from discussions of pay for skills and compensation," (Testimony to Dunlop Commission, Jan. 19, 1994, 11). Thus nonunion plans, at least the legal ones, must focus primarily on methods of work or production, leaving unrepresented employees with no meaningful voice in determining their pay or other conditions of work. From such data Applebaum drew the not-surprising conclusion that a "strong case can be made that a major obstacle to the diffusion of the empowerment model of high performance is the low level of unionization in many industries." Id. See also E. Appelbaum & R. Batt, THE NEW AMERICAN WORKPLACE (ILR Press, 1994) 164.

[82] As Professors Mahoney and Watson have observed, "[p]erhaps the greatest threat to development of a social exchange with the work force is the threat of job loss." Mahoney and Watson, Evolving Modes of Work Force Governance: An Evaluation, in Kaufman & Kleiner, supra note 37, at 136, 164. They conclude that "[r]ealization of the social exchange benefits of direct participation is possible only within an exchange system that is perceived as just and equitable." Id., at 165. See also Kelley & Harrison, Unions, Technology, and Labor-Management Cooperation, in L. Mishel & P. Voos, eds., UNIONS AND ECONOMIC COMPETITIVENESS (M.E. Sharp, 1992): "Non-union work places with joint labor management problem-solving committees are significantly less efficient and less likely to provide job security than is a traditional union-based system of work place governance. For collaborative problem-solving to succeed, it must be possible for employees to achieve outcomes that also empower them."

than ever before, unions have something to offer, not just to employees but also to their employers, something which management cannot achieve unilaterally.

I shall close this presentation on a note of optimism. Assuming Section 8(a)(2) is not repealed or weakened, and assuming the NLRB does its proper job of enforcing that provision, the new hallmark of union organizational activity in much of industry will likely be the combined appeal of broad-based worker-participation programs and due-process grievance procedures, neither of which can be fully or legally achieved in a nonunion company. Perhaps we shall even come to see the day when at least some American companies will view the organization of their employees not as an act of treason but rather as an opportunity to gain a helpful partner in the areas of employment and production.[83]

Statement of the National Association of Manufacturers

The National Association of Manufacturers (NAM) is pleased to submit this statement in support of the Teamwork for Employees and Management (TEAM) Act, S. 295 and H.R. 743.

The NAM is the nation's oldest and largest broad-based industrial trade association. Its more than 13,000 member companies and subsidiaries, including 9,000 small manufacturers, are located in every state and produce approximately 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector, 185,000 businesses and more than 18 million employees.

The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth in a global economy, and to increase understanding among policy makers, the media and the general public about the importance of manufacturing to America's economic strength and standard of living.

Founded one hundred years ago in Cincinnati, the NAM is proud to celebrate its centennial in 1995. The NAM is headquartered in Washington, D.C., and has regional offices across the nation.

Introduction

Through the TEAM Act, Congress has the opportunity to make an enormous contribution to the vitality of employer-employee relations in this country, and to the strength of American industry. We are grateful for this chance to present our views.

NAM members believe that increasing workplace productivity and quality is a key imperative to our individual and collective security. Similarly, competing in the global economy is the goal of every business; it is also the greatest challenge facing American industry. In addition, achieving high performance workplaces and organizations should be the aim of every worker as well, since the interests of employees and employers are directly, firmly tied to our ability to achieve mutual successes.

And this brings us to the key element for achieving these and other important objectives: the ability of employers and their workers to engage in cooperative efforts without unnecessary hurdles imposed by federal legislation and its interpretation. Employee involvement (EI) is a competitive imperative. The NAM believes that the TEAM Act would ensure that such efforts are not subject to sanctions. Accordingly, we urge its swift adoption.

The Issue

The National Labor Relations Act (NLRA), as enacted in 1935 and later amended in 1947 and 1949, seeks to ensure the employee's freedom of choice on whether or not to belong to a union and engage in collective bargaining. The original statute included provisions intended to prohibit sham or company unions, a tactic used early in the century to defeat union organizing drives. Two of the principal provisions addressing this issue are sections 2(5) and 8(a)(2) which read:

Section 8(a)(2) provides that it is an unfair labor practice for an employer: to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

A "labor organization" is defined in Section 2(5) of the Act, 29 U.S.C. §152(5), as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole

[83] See Morris, supra note 48.

or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Application of these provisions, particularly section 8(a)(2), largely eliminated sham or company unions by mid-century. Unfortunately, their recent interpretation by the National Labor Relations Board (NLRB) prevent the types of legitimate cooperative relationships and partnerships in the workplace that encourage employee involvement in decision-making. The Electromation (1992) and DuPont (1993) decisions raise uncertainties about the conduct of cooperative programs. Notwithstanding the acknowledged importance of employee involvement by Congress, the Administration and the Dunlop Commission, these and other decisions by the NLRB raise questions about the legality of EI.

The NAM, during several of its many appearances before the Commission on the Future of Worker-Management Relations (Dunlop Commission), acknowledged differing views on the import of Electromation and DuPont. Some view the effect as narrow and others, very broad. The NAM position, in light of these differences, is to pass the TEAM Act and remove any question. In other words, everyone agrees—employers, academics, government and workers—that cooperation provides a competitive advantage. Let employers and their employees work together without unwarranted government restriction. A more generous reading of the Act may not have affected the results in these cases but could properly interpret the statute to avoid wholesale repudiation of a major area of development which benefits employees, unions, employers, consumers, and the government itself through increased self esteem, quality, productivity, and competitiveness.

With the foregoing as a predicate to the NAM's support of the TEAM Act, the following elaborates on the value of employee involvement, together with its role in encouraging and advancing high-performance work organizations.

PARTICIPATION AND COOPERATION

One familiar means of achieving participation and cooperation between labor and management is, of course, collective bargaining between an employer and the union representing its employees. Our system of industrial democracy demands that employees be able to choose, freely, to unionize or, equally important, not to unionize.

Where unions are present, they can and often do aid cooperation and participation. But non-union companies have made significant strides in increasing participation and empowerment and, some would argue, have been on the forefront of employee involvement. This may be due to the flexibility of these types of worksites, as well as the growing sophistication of human resources departments. Employers have focused in recent years upon employee education and participation as a means of meeting the needs of today and constructing the workplace of the future. Businesses recognize the importance of responding to the needs of their employees and creating a human resources system that integrates corporate and individual concerns.

These companies have of course adopted a number of different means of fostering worker participation. Nearly all should be encouraged. But one type of employee involvement that currently merits special attention is the treatment of employee committees under federal labor law. Some regard the National Labor Relations Board's recent Electromation decision as sounding a death knell for employee committees. It is not at all clear that this is so.

First, some employment lawyers believe that the implications of Electromation have been exaggerated. The Board made clear throughout that case the fact-bound nature of its decision. Moreover, the lead opinion for the Board emphasized at the outset that the decision was "not intended to suggest that employee committees formed under other circumstances for other purposes" would be illegal, for example, to improve quality or efficiency.

Second, if Electromation does have the broad import some have attributed to it, then the fact remains that a decision so adverse to employee involvement was at best permitted by the NLRA; it was not compelled by the Act, and therefore Electromation to that extent can and should be disavowed by the new Clinton Administration Board.

Third and last, if such an agency interpretation is not forthcoming, then the value of employee involvement, in whatever form it takes, is sufficiently great that the NAM supports legislation, like the TEAM Act, to amend the NLRA to eliminate any question about the legality of such programs. Employee participation is one of the leading goals of employers and employees alike, according to independent surveys of management and workers; an Act and an agency designed exclusively to serve these two groups should not stand in the way. Nor should legislative reform be

made to depend on other goals that are less important and on which there is less agreement.

REWARDS OF PARTICIPATION AND COOPERATION

The NAM would like to suggest some other benefits of participation and cooperation between labor and management. As discussed, participation and cooperation can increase productivity. They can also make workers' jobs more pleasant and satisfying. By meeting these ends there is something else that participation and cooperation can accomplish: they can help reduce the extent and costs of government intervention in the employment relationship.

THE ELEMENTS OF HIGH PERFORMANCE

In order to compete in today's global economy in a way that increases productivity without reducing employment, the proper aim of every American employer and employee should be a high performance workplace. Defining a "high performance workplace" is not easy and it is clear that not every business reaches success by the same route. But there are several characteristics that "high performance workplaces" tend to share.

As you may be aware, the NAM has been engaged in a cooperative effort with the Department of Labor for more than three years on this question. Based on 18 focus group meetings with corporate executives and workers, some conducted jointly, we identified the following:

Providing the capital investment and technology that workers need;

Appropriately increasing training and the investment in human capital;

Continuing to improve safety and working conditions in a manner that increases workplace flexibility; and

Encouraging a culture that empowers workers for greater participation, improves labor-management communications and cooperation, rewards performance, and generally moves the enterprise toward greater teamwork.

Further, four cross-cutting themes emerged from both worker and CEO focus groups as imperatives to increased productivity, particularly as they are affected by cooperation and participation. The collective view was that manufacturers must:

Improve communications between workers and management;

Find ways to continually develop and upgrade worker skills;

Empower front-line workers to use those enhanced skills; and

Make a total commitment to quality in all products and services.

These characteristics and themes are all recommendations to which the NAM subscribes.

CONCLUSION

We would close with the suggestion that a good analogy to draw and apply to the your deliberations is the framework of the Vice President's National Performance Review. How do we make the system perform in a more effective manner by empowering employees to do their jobs better, and by eliminating excessive regulations and streamlining those that remain?

The NAM believes the best way to achieve that end is by enacting the TEAM Act. We stand ready to offer whatever may be necessary to ensure that constructive legislation emerges from this Committee.

STATEMENT OF HOWARD V. KNICELY

Madame Chairman and members of the committee: My name is Howard V. Knicely. In addition to serving as the Chairman of the Labor Policy Association, I am the Executive Vice President-Human Resources, Communications and Information Resources for TRW, Inc. TRW has 62,000 employees worldwide, 9 percent of whom are represented by various unions. While TRW is primarily known for its automotive manufacturing operations, about 27 percent of our employees work in our Space & Defense segment and are considered "knowledge workers" with scientific and engineering backgrounds, while another segment of our population, about 8 percent, are in service-related businesses. The employee involvement principles that I will be discussing apply to all three segments of our business.

I am pleased to discuss the importance of employee involvement to companies like TRW and to express the strong support of TRW and the Labor Policy Association for S. 295, the "Teamwork for Employees and Management (TEAM) Act," which would remove restrictions in the labor laws on the ability of employers and employees to resolve workplace problems through team-based "employee involvement" (EI) structures.

WHAT IS EMPLOYEE INVOLVEMENT?

The growth of employee involvement (EI) represents a sea change in the structuring of employer-employee relationships. For most of this century, the accepted American method of human resource management (named "Taylorism" after Frederick Taylor, a turn-of-the-century engineer) has been top-down decision-making aimed at minimizing brain work at the shop-floor level. Employees simply did as they were told by their supervisors, who also operated within confined parameters set by their superiors. Decades ago, when global market forces were relatively static with the United States in the dominant position, Taylorism ensured the continuity and conformity necessary for American companies to maintain their economic supremacy. In today's dynamic world, however, the only constancy is change itself. Survival requires continuous adaptation to shifts in customer needs and demands. Companies must perpetually rethink all aspects. of their organizations, including the way in which work is organized and performed. In this setting, the static effects of Taylorism often become a barrier to the reengineering process.

Thus, over the past two decades companies have turned away from Taylorism towards the employee involvement principles taught by W. Edwards Deming and others. The foundation of these principles is the dynamic work team concept that moves as much brain work as possible to front-line employees. It involves employees intellectually in the business operation and commits them to making the process function more effectively while constantly seeking their input into methods of improving it.

Growth of EI. The National Labor Relations Act was written when Taylorism was still the dominant form of labor-management relations. Because it did not anticipate the growth in employee involvement, the Labor Act in large part bars its use. Despite these existing legal restrictions, however, EI has become widespread in the American workplace. A 1994 survey performed by LPA and four other business organizations at the request of the Commission on the Future of Worker-Management Relations (Dunlop Commission) found that 75 percent of employers responding had incorporated EI to some extent into their operations. The Nature and Extent of Employee Involvement in the Workplace (1994) (hereinafter EI Survey) Among employers of 5,000 Or more, the percentage was 96 percent. At the same time, the survey showed that most of the recent growth in EI has occurred among smaller companies (i.e., those with fewer than 50 employees), nearly 60 percent of whom had implemented EI during the previous three years.

The Dunlop Commission observed that there has been a "substantial expansion" in the use of EI since the 1980s, but cautioned that its existence is "fragile" because of the "risks and obstacles" it faces. Clearly, a major obstacle is the current legal situation- Electromation casts a significant legal cloud over the use of EI. However, if that cloud is removed, few business leaders question that EI will continue to grow because they view it as being critical to their companies' ability to compete.

Infinite Variety. Employee involvement manifests itself in a variety of forms:

broader and more flexible job designs making work more meaningful;
innovative reward systems that recognize the employees' contribution to the success of the enterprise and make them feel they have a stake in that success;
a renewed emphasis on training and development; and
more effective two-way communications between managers and employees.

Employee involvement is not a set "program" capable of rigid definition. Rather, it is a way of employees and employers relating to one another. It is a means by which work is organized within a company, and it is a method of doing business. Because of this, there is no single dominant form of employee participation. It usually includes some structured method for addressing workplace issues through discussions between employees and employer representatives. Attempts to attach labels to these forms—e.g., quality circles, self-managed work teams—are helpful for discussion purposes, but the fact remains that no single EI "model" has been proven to work in all workplace settings.

Indeed, two out of every three employee involvement structures do not even have a manual of procedures, thereby allowing the participants to design their structures to meet their changing needs. Edward Lawler III, Gerald Ledford & Susan Mohrman, Employee Involvement in America: A Study of Contemporary Practice. 33 Houston, TX: American Productivity and Quality Center (1989). The EI Survey found that the average respondent used at least 10 different kinds of employee involvement strategies among its operations. Thus, flexibility is essential to the operation of.employee involvement.

Employee Involvement at TRW. In the late 1960s and early 1970s, TRW, along with corporations like General Foods, Procter & Gamble, and Cummins Engine, re-

alized that increased global competition was forcing us to consider dramatic changes in the management of our organizations. We recognized early that these changes were necessary to remain successful and, in some cases, to survive.

We were at the threshold of a "revolution" in human resource philosophy wherein we realized that the previous way of managing work and people had underutilized a tremendously valuable asset—the intellectual resources of our work force. Through an early experiment by TRW in a pilot plant in Lawrence, Kansas, in 1976, we discovered that getting employees more involved in corporate decision-making often resulted in decisions that were more responsive to the needs of both the people working on the shop floor and our customers. Our pilot plant became a showcase for the industry.

The 1970s were a revolutionary time for TRW as we experimented in such locations as a bearings plant in Gainesville, Georgia, an automotive steering plant in Lebanon, Tennessee, and a valve plant in Danville, Pennsylvania, with a wide variety of practices, some of which worked and others which did not. One of the critically important lessons we learned was that a highly successful program in one facility might not work at all in another. The nature of the work, the local culture, the personalities of the local players, the history of relations between employees and management, and myriad other factors determined how and whether employee involvement could be implemented. In some cases, employee involvement did not work at all. In others, it was a smashing success. But, even among those approaches that worked, we learned very quickly that no two were alike.

Where employee involvement has been successful, it is wholeheartedly embraced by both the company and the employees. For the company, it means increased productivity, higher levels of employee satisfaction, improved quality and a more competitive position in the marketplace. For the employee, we have only to look at the results of our own employee opinion surveys. Our most recent surveys indicate that TRW's employees:

decide for themselves how to accomplish their jobs (88%);
are responsible for planning the work they are expected to accomplish (84%);
feel free to talk to their supervisors about ideas and problems (81%); and
feel free to give suggestions to their supervisors about improvements in their departments (80%).

Establishing a culture that embodies the principles of employee involvement has not been an easy task. Indeed, it is a continuing one where we are constantly seeking to improve, such as the following, the effectiveness of EI. Yet, we continue to pursue it because the benefits of employee involvement are impressive:

a more highly trained work force;
increased employee satisfaction with work;
greater efficiency;
greater customer satisfaction;
more competitive enterprises, thus increasing overall job security; and
a more enviable position in the global marketplace.

These are all things that our society seems to be clamoring for.

I find that those who tend to support maintaining the current antiquated law tend to operate from one of two contradictory impressions: 1) employee involvement is a substitute for collective bargaining; and 2) employee involvement is inseparable from collective bargaining and can only be successful when the two are combined. In fact, both of these impressions are inaccurate. Collective bargaining and employee involvement are two separate ventures. Our company's experience proves this. We have facilities where there is successful employee involvement with a collective bargaining agreement in place, and we have others where there is successful employee involvement without collective bargaining. The fact of the matter is that employees view the two processes as separate and distinct. Under employee involvement, the employees view themselves as offering their own individual views for improvements, which may or may not involve working conditions. Under collective bargaining, they view themselves as speaking with a single "collective" voice on issues that only involve working conditions.

Employee Support. TRW employees are not alone in their support for employee involvement. EI is strongly endorsed by workers generally, as demonstrated in a study recently released by the Princeton Survey Research Associates (hereinafter the PSRA Study). The study was supervised by Professors Richard Freeman and Joel Rogers, the former a member of the Dunlop Commission. They found that 76 percent of the workers surveyed believed that "if more decisions about production and operations were made by employees, instead of managers," their company would be "stronger against its competitors." When presented with a choice among three

broad forms of employee relations and worker protection structures-informal EI committees, unions, and labor laws—63 percent chose committees, 20 percent chose unions, and 15 percent chose laws.

Of those employees who had actually participated in EI, 79 percent of nonmanagerial, nonunion participants reported having "personally benefitted from [their] involvement in the program by getting more influence [in] how [their] job is done," according to the PSRA Study.

One finding made by the PSRA Study stands in sharp contrast to the assumption on which our labor laws are premised—that employer interests and employee interests are fundamentally different and can only be harmonized through the conflictual process of collective bargaining. Asked to choose between two hypothetical employee organizations, "one that management cooperated with in discussing issues, but had no power to make decisions" and "one that had more power, but management opposed," the employees chose the former by a margin of three to one.

General Federal Support. Despite the restrictions in law, the federal government has generally encouraged employers to adopt employee involvement. The coveted Malcolm Baldrige National Quality Award is based to a significant extent upon a company having a "highly involved and motivated workforce." GAO, Management Practices: U.S. Companies Improve Performance Through Quality Efforts 18 (NSIAD-91-190, 5/2/91).

The Department of Labor, through its Office of the American Workplace, exhorts employers to adopt employee involvement structures and attempts to provide technical assistance to their efforts. As recently as September 1994, the Office issued a brochure entitled Road to High-Performance Workplaces: A Guide to Better Jobs and Better Business Results, which provided a number of exemplary EI case studies that "offer empirical evidence to support the link between workplace practices and corporate productivity."

Last year, the Congress reconfirmed its own support for employee involvement in passing the Workers Technology Skill Development Act (Title V, Part D of Pub. L. No. 103-382), which provides competitive grants to help identify the best EI practices, disseminate information, and provide technical assistance regarding them.

Yet, for all this encouragement, the federal government has thus far failed to take the one step needed to allow EI to expand and evolve—deregulation.

RESTRICTION AGAINST "COMPANY UNIONS"—SECTION 8(A)(2)

The law currently restricting employee involvement—Section 8(a)(2) of the National Labor Relations Act (NLRA)—was passed in 1935 as part of the basic law governing election of unions and subsequent collective bargaining. At that time, a tactic commonly used by employers to defeat union organizing was to establish sham "company unions." These organizations pretended to engage in collective bargaining, but in reality followed management's bidding and were typically run by officers handpicked by management.

To prevent further use of this tactic, the authors of the NLRA made it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

Sec. 8(a)(2), NLRA, 29 U.S.C. §158(a)(2).

To guard against employers circumventing this restriction through creative structuring of the sham unions, the NLRA defined "labor organization" broadly to include: any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Sec. 2(5), NLRA, 29 U.S.C. §152(5).

Immediately following enactment of this broad prohibition, the new National Labor Relations Board took very seriously its mandate to eradicate sham company unions. In the early years, about one in every five NLRB cases involved 8(a)(2) violations, but by 1947, the threat of company unions had diminished to the point that NLRB Chairman Herzog was able to observe: This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them.

Detroit Edison, 74 N.L.R.B. 267, 279 (1947).

Thus, Section 8(a)(2) cases have dwindled in recent years to fewer than 1 in 20, and nowadays those cases usually involve a different kind of 8(a)(2) violation, namely, whether the employer favored one of two competing unions. However, an unfortunate side effect of the Act's 1935 language has been the development of a broad,

mechanistic interpretation of Section 8(a)(2) that now goes far beyond the sham unions the law was originally designed to prevent.

To illustrate the disconnection between the law and modern workplace practices, consider the following example in a modern setting: At a nonunion metal stamping plant that runs two shifts a day seven days a week, the plant manager tells a supervisor to ask each section of the plant to send someone to a meeting in the conference room that afternoon. Some sections send equipment operators while supervisors attend on behalf of the other sections. The plant manager opens the meeting by saying that one of the two schedulers has quit and that the other one is about to because trying to work out the staffing for each shift has driven them crab. Between weekends, vacations, taking kids to the doctor, hunting season, little league baseball, and the like, trying to juggle everyone's special requests has become a nightmare. The plant manager tells the representatives that she wants to try a new system. "From now on, each section is going to work out the staffing for itself I've put laminated boards outside my office, and I'm passing out a box of grease pencils to each of you. Each week, I'll look at the boards and make sure I don't have a problem with what you guys have done. If I do see problems, we'll have to talk about it. For example, I don't want anyone working more than 40 hours in a work week because we can't afford the overtime." The meeting breaks up with everyone saying to the plant manager, "Thanks for finally listening to us. This is going to make life a whole lot easier for everyone, including yourself."

In this case, the plant manager is merely trying to accommodate the needs of her employees rather than address some broader purpose. The employees are being provided greater decision-making authority that is ultimately enhancing both their working lives and their personal lives. Yet, as will be seen through the following discussion of the current state of the law, this arrangement is illegal.

Electromation. As new employee involvement structures emerged during the 1970s and 1980s, legal scholars wondered whether the employer-employee committees fell within the definition of "labor organization." In addition, they questioned whether, because of the close relationship that resulted between employee and employer, the latter could be held to be "dominating" these new organizations. In response to these growing concerns, the NLRB in 1991 decided to reexamine its interpretation of Sections 2(5) and 8(a)(2) in light of the many forms of EI that had begun to flourish in the workplace.

The NLRB case itself involved a situation far removed from the sham unions of the 1930s. Electromation, Inc., is an Indiana company with about 200 employees that manufactures electrical components. When the events in question took place, its employees were not represented by any union. In early 1989, the company responded to an employee morale crisis by establishing five "Action Committees" to address the issues causing the most problems. As later determined by the NLRB, the company did not establish the committees to prevent a union. In fact, when the company learned that a union organizing drive was underway, it pulled out of the committees to try to avoid tainting the election. When the Teamsters lost the election, they commenced the Section 8(a)(2) action against the Action Committees.

In considering the Electromation case (309 N.L.R.B. No. 163 (1992), the NLRB conducted a rare public hearing and received numerous amicus briefs in support of reinterpreting the law. Most amici urged the Board to follow a line of cases out of the Sixth Circuit that examined whether the employer's practices had infringed upon the employees' freedom of choice regarding union representation for purposes of collective bargaining.

Sixteen months after the hearing, the Board ruled against Electromation and reasserted its traditional mechanistic approach. The only issue the entire Board could agree upon was that the facts had established an 8(a)(2) violation, but no agreement was reached regarding how 8(a)(2) should be applied to employee involvement generally, with three separate concurring opinions filed on that question. While the Board claimed that the case was not a blow against employee involvement, few labor attorneys have been able to distinguish their clients' employee involvement structures from those in Electromation. On September 15, 1994, the Seventh Circuit upheld the Board's decision. Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994).

Components of an 8(a)(2) Violation Because of the Board's own confusion regarding the application of Section 8(a)(2) to employee involvement, it is virtually impossible for an employer and its employees to know what they can and cannot do under current law. At the same time, a careful examination of the factors that can render an employee involvement structure illegal shows the law's perverse effects on workplace cooperation. I will briefly discuss each of these.

1. "Conditions of Work." Only if a company can keep its work teams from discussing any and all "conditions of work" will they be immunized from legal attack. In

such cases, they cannot be deemed "labor organizations." Unfortunately, the NLRB has so broadly defined the term "conditions of work" that it includes a great deal more than wages and hours. The metal stamping plant example described earlier involves a clear-cut example of a condition of work, i.e., scheduling. In addition, even though they may play a crucial role in efficiency, productivity, and quality, the following cannot be addressed by nonunion work teams: workplace health and safety; rewards for efficiency and productivity; work assignments; work rules; job descriptions and classifications; production quotas; use of bulletin boards; workloads; changes in machinery; discipline; hiring and firing; and promotions and demotions.

Yet, as most companies (and even AFL-CIO General Counsel Laurence Gold)[1] have found, it is virtually impossible to avoid touching on these topics in the pursuit of efficiency and productivity. For example, a group of employees may decide that the best way to improve productivity is for each employee to begin learning how to do the other employees' jobs. However, this discussion would have to be curtailed because it involves job descriptions and classifications, a "condition of work."

2. "Dealing With." A "labor organization" will exist if employees are "dealing with" management regarding "conditions of work." The Supreme Court held in the 1959 Cabot Carbon case (360 U.S. 203) that "dealing with" covers a broader range of activities than collective bargaining, but failed to specify those activities. The Board has said that "dealing with" exists if there is "a pattern or practice in which a group of employees, over time, makes proposals to management [and] management responds to these proposals by acceptance or rejection by word or deed." E.I. du Pont de Nemours & Co., 311 N.L.R.B.No. 88, at 2 (1993).

In other words, if management merely listens to the employees but does absolutely nothing in response, there is no "dealing with" and there can be no violation. It is only when management seeks to address the employees' concerns, truly empowering them, that it is "dealing with" the employees and a violation exists. Thus, in the metal stamping plant example, the plant manager's actions would have been legal if she had simply dictated the schedules to the employees or if she had listened to their scheduling needs but done nothing to accommodate them. By giving the employees a role in scheduling and by working with them to be sure their needs and the company's needs were addressed, the company engaged in "dealing with" the employees on conditions of work.

3. Representation. Strangely, the NLRB has failed to address whether employees in the EI. structure must represent other employees for a "labor organization" to exist. Thus, a committee whose employee members speak entirely for themselves with no input whatsoever from the other employees could possibly be considered a "labor organization."

4. Independence of the Employee Involvement Structure. If an EI structure is deemed a "labor organization," illegal management "domination" will be found if the structure is not totally independent from management. Yet, the very purpose of EI is not for management and employees to work independently, but to work together. Thus, the structure often would have little value if management completely detached itself.

In fact, many, if not most, EI structures would not even exist if management had not originated them. Indeed, as in the metal stamping plant example, EI structures are frequently initiated by top-level management, which usually faces a formidable task in convincing front-line employees and particularly middle management to go along. As Steven M. Darien, Human Resources Vice President of Merck & Co., Inc., stated before the Dunlop Commission:

Employee involvement is about fundamentally changing a corporation's culture. There are many employees, managers and unions who are comfortable with old-style management which either gives them the power to tell employees what to do or gives them the security to simply do what they are told to do, right or wrong.

Yet successful EI depends ultimately upon employee choice. If the employees do not believe in it, EI fails no matter how it is structured. By the same token, if the employees embrace EI, it will be extremely difficult for management to dislodge it. As Mr. Darien stated in his testimony, "once the genie is out of the bottle, you can't put it back in."

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[1] In the September 5, 1991, oral argument before the Board, Mr. Gold, arguing as amicus curiae, stated: What is productivity? It's who does what, it's whether A works certain hours, whether B gets relief, whether a particular way of moving materials is sound or unsound. People are affected by that, their jobs and prerogatives, their seniority, their vacations. All of that is the stuff of working life. And to say that you can abstract productivity from working conditions is something that I have a great deal of difficulty with.

While the law insists that management remain detached from EI structures, employees themselves prefer management involvement, as the authors of the PSRA Study found:

Most employees see management acceptance of employee involvement and cooperation with employee organizations as critically important: Asked to choose between an employee organization that "management cooperated with in discussing issues, but had no power to make decisions" and one "that had more power, but management opposed," employees prefer the weak organization to the strong by a 3-1 margin.

5. "Safe Havens." The Board has attempted to provide some comfort to employers by listing certain "safe havens" that do not meet the definition of a "labor organization": "brainstorming" sessions to develop, but not propose, ideas; information sharing; suggestion boxes; and conferences, where employees are encouraged to talk about their experiences.

Not surprisingly, suggesting these options to a sophisticated human resources practitioner is like suggesting to a modern politician that he or she rely exclusively on yard signs, bumper stickers, and handshakes at barbecues to get elected to Congress.

Another "safe" structure for an employer is a "self-directed work team" where management has totally delegated a function to a group of employees and has no input or veto authority over the decisions made by the team. General Food Co., 231 N.L.R.B. 1232 (1977). Such teams are employee involvement taken to its most sophisticated level and, at present, exist in very few operations. A number of companies institute EI with the goal of ultimately having self-directed work teams, but even where they are successful, they do not happen overnight. The gradual shift from top-down decision-making to a "flattened" structure goes through many models along the way, usually involving some form of "dealing" between management and employees until the team becomes totally self-directed.

6. Union v. Nonunion Settings. Employers in a union setting have considerable freedom under the law in setting up EI structures, as long as they work with the union in both establishing and operating them. Under E.I. du Pont de Nemours & Co., unions effectively have veto authority over any EI structures involving employees they represent, but if they participate in those structures, the NLRB is unlikely to find a violation.

Most legal problems occur in the nonunion setting, which includes 88 percent of the private sector work force. The absence of an independent collective bargaining representative taints virtually any EI effort as far as the NLRB is concerned. The result is that employees are being told by the Board that they may only act through a union if they wish to work with their employer to resolve workplace issues.

There has been considerable debate as to whether EI works better in a union or a nonunion setting. In a study of the academic literature prepared for the Dunlop Commission by the University of Southern California, the authors concluded that the research studies "show no significant relationship between the presence or absence of a union and the effectiveness of employee involvement practices." Gary C. McMahan and Edward E. Lawler III, Effects of Union Status on Employee Involvement: Diffusion and Effectiveness, Washington, D.C.: Employment Policy Foundation (1994).

The EI Survey determined that 56 percent of the responding companies who had both union and nonunion EI structures found them more successful in their nonunionized work settings. Forty-two percent found them equally successful in both settings, and 2 percent found greater success in their unionized settings.

The argument is academic. One has only to look at the highly successful companies who have adopted EI to recognize that EI can work effectively in either setting.

7. Management Intentions/Employee Perceptions. Unfortunately, what are clearly not factors in determining whether an 8(a)(2) violation has occurred are management's intentions and the perceptions of the employees. In Electromation, the Board deemed it irrelevant that the Action Committees were formed without any knowledge of union organizing activity, and it refused to consider whether the formation of the committees had interfered with the free choice of the employees.

In Webcor Packaging Inc., 7-CA-31809 et al. (Oct. 28, 1993), the employer told employees not to discuss "conditions of work" when meeting with its Employee Involvement Steering Committee. Only after the employees repeatedly raised these issues did the employer form another committee to deal with those issues. Not surprisingly, the NLRB administrative law judge found an 8(a)(2) violation even though the committee had been established to accommodate the employees. In his decision, the ALJ went to great lengths to explain that Webcor was not motivated by preventing union organizing, but was instead committed to "involving all of the people in our

operation in thinking . . . [n]ot checking their brains at the door." The case is pending before the Board.

It is this failure of the Board to consider the employer's reasons for initiating EI and the employees' satisfaction with those structures that poses the most serious threat to successful EI structures in the American workplace.

IMPACT ON EMPLOYEE INVOLVEMENT

If the law is so prohibitive, why is employee involvement as widespread as it is? One reason is that, by the time the Electromation controversy erupted in 1991, EI had already taken on a life of its own in the American workplace. Throughout its growth in the 1970s and 1980s, few human resources managers would have suspected that such a positive development could actually be illegal.

Since Electromation was decided, companies have continued to maintain their EI structures, but they have become wary. The EI Survey found that one out of every five respondents was becoming more cautious about broadening existing EI structures or implementing new ones. Only 5 percent believed there were no legal problems.

The vulnerability of companies under the current law was demonstrated last month when a Section 8(a)(2) charge was filed with the NLRB against the Donnelly Corporation, an auto parts manufacturer in Holland, Michigan. Donnelly has an exemplary employee involvement structure that has been in place for a number of years and has been cited frequently as a model EI structure. Even the U.S. Department of Labor has cited Donnelly in its 1990 catalogue of noteworthy EI operations entitled The New Work Systems Network: A Compendium of Selected Work Innovation Cases (BLMR 136).

Donnelly testified before the Dunlop Commission last year and was cited in the Commission's fact-finding report as a model company. The charge was filed based entirely upon Donnelly's testimony. Even more outrageous is the fact that it was filed, not by a Donnelly employee, but a labor law professor who is convinced that EI is and should be illegal under the NLRA. The NLRB General Counsel is reviewing the charge to determine whether to issue a complaint.

Indeed, the reason why most employers have been able to continue EI is because the National Labor Relations Act can only be enforced when a party files a charge with the NLRB. Thus, as long as no union attempting to organize a company or no disgruntled employee wishes to reverse the company's EI efforts, the employer is probably safe.

Yet when one of those parties takes action, the NLRB is showing no hesitation in moving against the employer. Attached to my testimony is a chart of the various cases pending before the Board and the courts involving Section 8(a)(2) violations.

Even employers whose EI structures seem to fall within one of the NLRB 's "safe havens" have to engage in lengthy litigation over the question. In NCRB v. Peninsula General Hospital Medical Center, 36 F.3d 1262 (4th Cir. 1994), the Board had ruled that the hospital's Nursing Services Organization (NSO) was an employer-dominated "labor organization." When the hospital appealed the case to the Fourth Circuit, the court ruled that the hospital had only engaged in "brainstorming" (a "safe haven") with the organization and that the Board had not even applied its own standards judiciously.

Similarly, in Monongahela Valley Hospital, 6-CA-26176 (Oct. 17, 1994), the hospital chose six employees to form a "Core Group" to provide suggestions for creating a job description for a new position. The NLRB administrative law judge rejected the hospital's argument that it was engaging in mere "information gathering" (another "safe haven") and ruled that the Core Group was a "labor organization."

Employers who see the results in Peninsula General and Monongahela Valley and hear about what happened to Donnelly realize that their EI structures, no matter how they are configured, are vulnerable to any unhappy employee or organizing union who may want to pull the NLRB trigger.

Yet even without such an event, most employers are disturbed with the notion that their operations may be in violation of federal law. For example, Polaroid attempted to restructure its long-standing employee committee after being advised by its labor attorneys that the committee was probably an illegal "labor organization." The company's employees were extremely unhappy with having to restructure a committee that had served them so well, but they went along with the changes - Nevertheless, the new committees wound up being subjected to NLRB prosecution. The case (1-CA-29966) is awaiting a decision by an administrative law judge.

When the current Chairman of the National Labor Relations Board, William B. Gould IV, was sworn in, some had hoped that he would move the Board in a more flexible direction in interpreting Section 8(a)(2). Indeed, in his book Agenda for

Reform (p. 262), he expressed his view that the law should "permit employers to have greater latitude in devising systems that promote and provide for communication between employees and employers on their own without [being subjected to an unfair labor practice complaint]."

Yet in Gould's first year, the Board has been preoccupied with other issues—e.g., conducting union elections through the Postal Service, jurisdictional battles with other labor agencies—and the 8(a)(2) backlog has continued to grow. Given the current makeup of the Board, few observers really expect Gould to make significant improvements when he finally gets around to the Electromation issue.

S. 295, THE TEAMWORK FOR EMPLOYEES AND MANAGEMENT (TEAM) ACT

It is clear that if the Electromation problem is to be fixed in a timely manner, it must be done by Congress. Section 8(a)(2) accomplished its goal of eradicating 1930s-style "company unions" long ago, and now its broad language needs to be tailored to accommodate progress in human resources practices.

S. 295 eliminates the threat to EI structures that are formed to "address matters of mutual interest (including issues of quality, productivity, and efficiency)" by exempting them from Section 8(a)(2) as long as they do not "have, claim or seek authority" to negotiate, enter into, or amend collective bargaining agreements. Thus, the bill leaves intact the prohibition against "sham" employer-dominated unions that hold themselves out to employees as collective bargaining agents. It is worth noting that many, including Harvard Labor Law Professor Paul Weiler, counsel to the Dunlop Commission, have suggested eliminating this prohibition altogether. In addition, the bill continues the requirement that an employer maintain neutrality between two different unions that are competing to organize the employer's work force. Midwest Piping Co., 63 N.L.R.B. 1060 (1945).

Moreover, the TEAM Act in no way diminishes the right of employees to form or join a union or to engage in collective bargaining. Nor does it allow an employer in an organized workplace to bypass the union in making changes in terms or conditions of employment.

At the same time, the TEAM Act does not attempt to substitute one form of regulation for another by imposing conditions upon employee involvement, such as elections of employee "representatives," sunset requirements, and so forth. Since any successful employee involvement structure depends upon the support of the employees, government imposed strictures to provide artificial protections to employees are, at best, unnecessary and, at worst, just as stifling as the current legal restrictions. One of the most valuable aspects of employee involvement is that it does not lend itself to "one size fits all," but instead evolves in each workplace to meet the needs of the company and its employees. Indeed, as the Dunlop Commission has pointed out, employee involvement is more likely to survive "if it expands beyond the confines of a single program or process."

A legitimate question concerning the TEAM Act is how one might distinguish between collective bargaining and employee involvement practices. While the latter may assume many different shapes and sizes, collective bargaining is a specific, unique type of dealing, which is described in Section 8(d) of the NLRA as the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

In the 60-year history of the statute, management, labor, and the National Labor Relations Board have developed a common understanding of what the collective bargaining process involves in order to assess whether the parties are fulfilling their bargaining obligations. While there will inevitably be some gray areas, the vast majority of employee involvement structures are clearly not engaged in collective bargaining, as that term is understood by those who practice it.

Dunlop Commission Report. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") recommended that nonunion employee involvement programs should not be unlawful simply because they involve discussions of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs.

It is a positive step forward that the Commission has recognized the legal jeopardy facing most employee involvement structures under Section 8(a)(2) of the National Labor Relations Act and the need to provide legal relief. Unfortunately, as has recently been acknowledged by the Commission's counsel, Professor Paul Weiler, the recommendation falls far short of providing the needed remedy. In fact,

this cleverly worded recommendation by and large does little more than reiterate current NLRB and court interpretations of Section 8(a)(2).

The central issue is whether groups of employees in a nonunion setting should be allowed to work directly with management to improve their terms and conditions of employment. The Commission's answer is a resounding no. Only if employees form themselves into a union, the Commission recommends, should such discussions be permitted to take place.

The fundamental flaw in the Commission's reasoning is that the line between "terms and conditions of work or compensation" and broad goals such as efficiency, productivity, or quality is not always easy to ascertain.[2] For example, an EI committee's purpose may be to design a program where the employees in a team are "cross-trained" to perform each other's functions, with pay incentives for each new skill acquired. Training and pay are clearly "terms and conditions of work or compensation." The larger goal of the company may be to increase efficiency, but the goal of the EI committee is to deal directly with certain working conditions. Thus, the NLRB may reject an employer's argument that the "terms and conditions" are "incidental."

Even where there is no "broad purpose" other than to address a working condition, one must ask what "evil" is sought to be prevented. Yet the metal stamping plant example described above would still be illegal under the Commission's recommendation because the shift-staffing issues were not "incidental" to any broader purpose.

Hence, the Commission itself points out in a footnote that the Polaroid committees that existed prior to 1992 would still be illegal under the Commission's proposal. As the Commission notes, their "primary functions" included "handling employee grievances and advising senior management about pay, work rules and benefits,"thus going "well beyond incidental involvement in issues traditionally reserved to independent labor organizations." Yet the Commission itself heard—and did not attempt to rebut—testimony from the CEO of Polaroid that Polaroid's employees had been extremely pleased with the empowerment they had achieved through their committees.

The Commission is substituting its own judgement for that of the Polaroid employees and other similarly situated employees in determining that they need to be represented by a traditional labor union. Most employers and employees today would prefer to let the employees make their own decision as to what best meets their needs.

There is one positive development here. The Commission did reject the recommendations of some witnesses that employee involvement structures only be permitted if they meet certain conditions, such as having elected employee representatives. This is an implicit acknowledgement by the Commission that there is no "one size fits all" to employee involvement.

The Commission also recommended that the law should continue to prohibit companies from setting up company-dominated labor organizations. The panel said that it should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to establish a new participation program or to use or manipulate an existing one with the purpose of frustrating employee efforts to obtain independent representation. Based on its explanation of this proposal, the Commission is simply reiterating the need to maintain a prohibition against sham "company unions," which led to the enactment of Section 8(a)(2) in 1935.

While no one would defend that Depression-era tactic, some—including Professor Weiler—have questioned the need to retain a separate prohibition. If the employer is engaged in coercive or deceptive tactics aimed at frustrating unionization, a separate violation of Section 8(a)(1)[3] will exist anyway. See, e.g., Farmers Energy Corp., 266 N.L.R.B. 722 (1983), enf'd, 730 F. 2d 1098 (7th Cir. 1984). If no such tactics are being used, today's employees are sophisticated enough to recognize the difference between a real union and a hollow one. If they are dissatisfied with the structure established by the employer, they can always petition the NLRB for an election.

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[2] An additional flaw in the Commission's recommendations is that, even under current law, no EI structure will be found illegal simply because it gets involved in terms and conditions of work or compensation. The structure must also be "dominated" by management, which can be established merely by management having a role in the formation and/or decision-making of the structure.

[3] "[It shall be an unfair labor practice for an employer] to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 7 [i.e., right to organize and join labor unions and bargain collectively]." 29 U.S.C. §1:58(a)(1).

Whether the prohibition is retained or not, today's employers recognize that, even if it is lifted, the "company union" tactics of the 1930s have little relevance to today's workplace. What is important is to provide the necessary relief that will enable employers and their employees to establish and operate EI structures that provide employees with genuine influence to over workplace decisions.

CONCLUSION

Businesses of the 90s are operating with an entirely different set of principles than the ones that gave rise to the labor laws. I urge this Committee to recognize this trend and register strong support for employee involvement by passing the TEAM Act. Labor law should be deregulated to allow American companies and their workers to continue down a path they started on 20 years ago when it became clear that old ways of doing business had to change. It is time for government policy to change as well.

In my company, as in most others, technology is being acquired in numerous ways—capital can be raised wherever the financial market is most attractive. However, the single most competitive advantage we have that cannot be acquired or copied is a well-trained, highly motivated, and involved work force. This is our hope for the 90s. Employee involvement is and must be a win-win strategy in all segments of our industrial policy.

Status of Pending 8(a)(2) Employee Involvement Cases

Case Name and Cite	Decision	Current Status
Bremner 26-CA-15859 (June 21, 1994)	ALJ ruled that safety committees did not violate 8(a)(2). Union setting.	Union did not appeal.
Dillon Stores 17-CA-16811 (Apr. 29, 1994)	ALJ ruled that associates committees violated 8(a)(2). Union setting.	Awaiting a decision by the full NLRB.
E.I. Du Pont 311 N.L.R.B. 893 (1993)	NLRB ruled safety and fitness committees violated 8(a)(2). Union setting.	Employer did not appeal.
Electromation 35 F.3d 1148 (7th Cir. 1994)	Seventh Circuit found company's action committees violated 8(a)(2). Nonunion setting.	Employer will not seek Supreme Court review.
Keeler Brass 7-CA-32185 (Oct. 1, 1992)	ALJ ruled that grievance committee did not violate 8(a)(2). Nonunion setting.	Awaiting a decision by the full NLRB.
Magan Medical 314 N.L.R.B. 173 (1994)	NLRB ruled that grievance committee violated 8(a)(2). Union setting.	Employer did not appeal.
Mononganela Valley Hospital 6-CA-26176 (Oct. 17, 1994)	ALJ ruled that personnel committee violated 8(a)(2). Union setting.	Employer did not appeal.
NCR Corporation 9-CA-30467 (May 26, 1994)	ALJ ruled satisfaction committees violated 8(a)(2). Nonunion setting.	Employer did not appeal.
Peninsula General Hospital 36 F.3d 1262 (4th Cir. 1994)	Fourth Circuit reversed Board and found nurses' committee did not violate 8(a)(2). Nonunion setting.	Board will not seek Supreme Court review.
Polaroid 1-CA-29966	Hearing scheduled for February 1995. Nonunion setting.	Awaiting an ALJ decision.
Seaboard Farms of Kentucky 26-CA-15388 et al. (Mar. 3, 1994)	ALJ ruled that transportation safety committees violated 8(a)(2). Union setting.	Employer did not appeal.
Stoody Company 26-CA-15425 et al. (Sept. 23, 1993)	ALJ ruled that handbook committee violated 8(a)(2). Nonunion setting.	Awaiting a decision by the full NLRB.
Vons Grocery 21-CA-28816 et al. (June 28, 1994)	ALJ ruled that committee did not violate 8(a)(2). Union setting.	Awaiting a decision by the full NLRB.
Webcor Packaging 7-CA-31809 et al. (Oct. 28, 1993)	ALJ ruled that employee committees violated 8(a)(2). Nonunion setting.	Awaiting a decision by the full NLRB.

The Debate over the Ban on Employer-Dominated Labor Organizations: What Is the Evidence?

James R. Rundle

Background

The debate over the National Labor Relations Act's ban on company unionism has taken center stage in the deliberations of the Commission on the Future of Worker-Management Relations, yet the debate has been informed by little factual evidence.

Section 8(a)(2) of the National Labor Relations Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization." The definition of a "labor organization" (Section 2(5)) is very broad: "any organization of any kind . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes," and so on. This means that if an employee committee deals with issues that a union would have a right to bargain over and if the committee is dominated by the employer, then the committee is illegal, and the National Labor Relations Board can order the committee to be disestablished.

The focus of most employee involvement programs, including teams, quality circles, total quality programs, and the like, is ostensibly on quality, efficiency, and customer satisfaction. Although these issues might not appear to be bargainable, many argue that bargainable issues are inevitably implicated in such programs (see *Electromation, Inc. v. Teamsters Local 1049*, 309 N.L.R.B. No. 163 (1992)). This would make the programs vulnerable to legal

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challenge, and several proposals have been advanced to modify Section 8(a)(2), or Section 2(5), in order to protect them from such challenges.

Who Favors Modifying the Ban?

These proposals arise from astonishingly diverse sources. Business leaders and Republican politicians say that Section 8(a)(2) must be changed if American business is to use employee involvement to compete in the world market.[1] In a variant of this argument, some members of the Commission on the Future of Worker-Management Relations have asserted that employee involvement is necessary for the creation of high-skill/high-wage jobs. But they also point to a "representation gap" in the American workplace owing to the decline of organized labor, arguing that Section 8(a)(2) needs modification if workers are to explore new channels for exercising "voice." Most of those advocating modification of Section 8(a)(2), however, also accept the employer's argument: that Section 8(a)(2) stands in the way of employee involvement (see Freeman and Rogers 1993a; Gould 1993; Weiler 1990:218). Commission chair John Dunlop views the legal constraints on employee involvement as the first issue the commission should address.

Altering Section 8(a)(2) is the only issue employers have advanced in the labor law reform debate, apart from their resistance to labor's proposals. It therefore stands as labor's only bargaining chip. The sole commission member drawn from the labor movement, former UAW president Douglas Fraser, has suggested trading some part of 8(a)(2) for better organizing rights.

Purpose of Section 8(a)(2)

There are reasons to worry about this developing bandwagon. The independence of workers' organizations is central to the purpose of the National Labor Relations Act. Section 7 gives workers a right to "*self*-organization" and "to bargain collectively through representatives of their *own* choosing" (emphasis added). Section 8(a)(2) was intended to safeguard this independence, and therefore it concerns the heart of the act.

The need for Section 8(a)(2) became clear in attempts to enforce Section 7(a) of the earlier National Industrial Recovery Act (1933). The NIRA established a right to organize and bargain collectively, but it did not distinguish company unions from independent unions. The result was that employers

1 See for example, Perl 1993; remarks of Rep. Steven Gunderson (R-Wisc.), in the *Daily Labor Report*, March 31, 1993, A-14, remarks of Jeffery C. McGuiness, Labor Policy Association, in the *New York Times*, Dec. 18, 1992, *amicus curiae* briefs to the NLRB in *Electromation* for the Manufacturers' Alliance for Productivity and Innovation, for the Chamber of Commerce of the United States of America, and for the Coalition of Management for Positive Employment, Training and Education, the National Association of Manufacturers, and the American Iron and Steel Institute.

organized employee representation plans much faster than workers organized unions, prompting Senator Wagner to state, "The very first step toward genuine collective bargaining is the abolition of the employer dominated union" (NLRB 1985, 1:15). In fact, the new National Labor Relations Board did root out many ERPs in its early years (Hutson 1992).

Furthermore, precedents under Section 8(a)(2) give unions important bargaining rights when employers propose these plans and empower unions to reject plans they do not believe to be legitimate.

Does Evidence Support Altering Section 8(a)(2)?

Altering a section of the National Labor Relations Act that was conceived as central to its purpose should not be contemplated on the basis of unexamined assumptions that "good-faith" employee committees are threatened by legal action. Nor should it be based on an unproven belief that most existing committees are fundamentally different from ERPs or that something like ERPs would never again stand in the way of organizing if Section 8(a)(2) were weakened. This is particularly true when the proposed alteration is the only one employer organizations favor and for which they have campaigned in a vigorous and, as we shall see, highly misleading manner.

One missing key is the record of Section 8(a)(2) in practice. Has the application of this section of law actually thwarted employee committees that empower workers and improve competitiveness through group processes? Since the belief that 8(a)(2) thwarts these efforts is so pervasive and influential, it is remarkable that no one has made a systematic effort to find out if this is actually true. Instead of information, we have heard mostly a fog of confusion created around a recent case, *Electromation*.

"Industrial Age Rules Bog Down Modern Economy"

In the Electromation case, employer organizations such as the National Association of Manufacturers, the Labor Policy Association, the Chamber of Commerce, and others waged what Charles Morris (1992) suggested was a deliberate "campaign of disinformation."

The Labor Policy Association's brief claimed that the decision of the administrative law judge (later upheld by the NLRB) allows for "only two options: traditional collective bargaining, based on the threat of economic warfare, or no involvement in work improvement efforts whatsoever," and asked whether the act would recognize "emerging workplace realities and maturing labor-management relationships, or will its gaze be frozen forever upon the adversarial labor relations landscape of 1935?" The Chamber of Commerce's brief warned, "The Board must find a way to accommodate the new organizational concepts in American industry, under which an employer and groups of employees work cooperatively to improve quality, productivity, and overall performance in order to be competitive at home and abroad."

Eleven Congress members filed a brief declaring that Section 8(a)(2) "sounds a potential death knell for what could be the key to economic rebirth" (Zurofsky 1992). Newspaper and magazine accounts echoed these apocalyptic warnings: "Firms Fear NLRB as Hurdle in Global Race," "Putting a Damper on That Old Team Spirit," "Setback for Labor-Management Teamwork Efforts," "A Wedge in the Workplace," "Remove the Cloud over Teamwork," "Quality Circle Busters," and "Industrial Age Rules Bog Down Modern Economy."[2]

Real Meaning of Electromation

This clamor was created without the slightest basis in the facts of the case. Electromation's committees dealt only with mundane terms and conditions of employment. Neither the employer nor the numerous *amici* filing briefs in the case ever argued that the committees were teams or quality circles or were formed with any intention of improving efficiency or product quality. What really is remarkable about *Electromation* is that the use of labor law by the employees and the Teamsters union was a stunning success. The Teamsters filed a Section 8(a)(2) charge after losing a certification election. A judge found that the employer had established and dominated committees that were functioning as labor organizations and ordered them to be disestablished. Then, through a stipulated election agreement arising out of efforts to settle the case, a second election was held, which the union won. Thus, as a direct consequence of acting on Section 8(a)(2), the employees gained a labor organization under their own control and used it to win enforceable rights.

Advocates of altering Section 8(a)(2) would greatly strengthen their position if they cited cases of thriving employee involvement programs, established in good faith and demonstrably beneficial to both company and employees, that were struck down by the NLRB. Indeed, if they cannot do this, then they are asking for a change in a major, long-standing statute without a single test case to show why the change is needed. That such a proposal has reached the top of the commission's agenda, at a time when unions are reeling from discriminatory firings, refusals to bargain, and hiring of permanent replacements, calls for prompt scrutiny.

It is my hypothesis that in actual practice, Section 8(a)(2) has had virtually no impact on good-faith experimentation with employee involvement. This hypothesis is tested through a review of 8(a)(2) disestablishment cases over the past twenty-two years.

Methodology

How can we know whether the board had disestablished committees of the type employers say they need to be competitive or that have "empowered"

2. From, respectively, the *Memphis Commercial Appeal*, May 31, 1992, *Business Week*, May 4, 1992, *New York Times*, Dec 18, 1992, *Houston Chronicle*, May 22, 1992; *Chicago Tribune*, July 12, 1993, *Wall Street Journal*, June 9, 1993, *Denver Rocky Mountain News*, June 27, 1993.

employees? There are thousands of employee involvement committees and hundreds of different plans. Are they *all* good and necessary? What criteria can we use to decide?

Employers simply say they want to make "good-faith" efforts to involve employees and point to their need to be competitive through improved quality and so forth. Some add that committees empower employees by increasing responsibility and decision-making authority. Although these criteria are vague, they proved to be easy to test in the existing cases.

To find the cases in which the board disestablished employee committees, I did a Lexis search of NLRB cases from 1972 to 1993 using "8(a)2" and "disestablish!" "disband!" or "dismantle!" as key words (the exclamation mark is a truncation symbol). This twenty-two-year period is the full range covered by Lexis. During this period employee involvement grew slowly at first and more rapidly later (Ichniowski, Delaney, and Lewin 1989) despite the existence of Section 8(a)(2). If Section 8(a)(2) had limited this development, we would expect a rise in the number of disestablishment cases over time.

There is no certainty that this search yielded every disestablishment case during the twenty-two-year period, but a check of several law review articles and briefs revealed no additional cases.

"Good-Faith" Criterion

The disestablishment cases were then checked for (1) other unfair labor practices; (2) whether the charge arose out of a union organizing campaign and, if it did, whether the committee was established during the campaign, revitalized at the time of the campaign, or engaged in new activity that might make the committee a more attractive alternative to unionism; and (3) whether a certified union was in existence and, if so, whether the employer had refused to bargain with it.

Antiunion motivation need not be shown to establish domination of a labor organization, so the board has not always determined whether a committee's formation or actions had the purpose of thwarting union activity. Also, other ULPs do not necessarily have any connection to the Section 8(a)(2) violation. For our purposes, however, if "good-faith" efforts at employee involvement are being thwarted by board decisions, we would expect to find cases in which no such indications of bad faith exist.

"Quality" and "Empowerment" Criteria

The decisions of the administrative law judges attached to board decisions are a rich source of information about the cases. The ALJ scrutinizes the employers' arguments and, in particular, the issues the committees discuss.

Using this resource, the cases were checked for evidence that the committees were created primarily to improve the quality of a product or service; to improve efficiency; to introduce new technology or new work practices, such

as total quality management; or to expand the scope of employee decision-making. If board decisions hampered experimentation with such activities, there should be evidence in the ALJ's record. We would expect to find that some committees engaged mostly in those activities but were struck down because they included some bargainable issues in their deliberations. We would expect some employers to argue that their committees' accomplishments were critical to the success of the firms and that the committees occasionally had to discuss bargainable issues to be fully effective. And if the committees empowered employees, we would expect to find in some cases that employees gained decision-making authority, not just the opportunity to make suggestions. Certainly, if any of these situations occurred, the employer would present the evidence and the ALJ would discuss its merits.

Results

Have Disestablishments Increased over Time?

The Lexis search yielded 101 citations, of which 58 proved to be cases in which the board had disestablished one or more employee committees (table 11.1). In the case of 19 citations, the board declined to disestablish. The other 24 citations proved irrelevant. If we divide the search period into two eleven-year blocks, 1972–82, and 1983–93, we find that the number of disestablishments has *decreased markedly* in recent years, not increased as we would expect if Section 8(a)(2) were limiting employee involvement (table 11.2). *In the last eleven years, the board disestablished in only seventeen cases, or less than two per year.*

Have "Good-Faith" Efforts Been Struck Down?

During the entire twenty-two-year period, the board ordered disestablishment in only five cases in which it found no other ULPs (table 11.2). Typical of the ULPs were interrogations, threats to shut down and lay off, surveillance, discriminatory discharge, soliciting grievances, promises, and granting improvements. In one case, charges of discriminatory discharge were settled by reinstatement (*North American Van*, 288 N.L.R.B. 11 (1988)), and in two others the committee was formed during an organizing campaign (table 11.1). *This leaves two cases in twenty-two years in which there were no other ULPs found and the committee that was disestablished had not been established in the course of a union organizing campaign.*

Have Quality or Empowerment Efforts Been Thwarted?

The two cases remaining are *Electromation*, in which the committees had nothing to do with quality, productivity, or empowerment, and *Alta Bates*,

Table 11.1. NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93

Abbreviated case name	*Board number*	*Year*	*Organizing campaign*[a]	*Union in existence*[b]	*Other sections violated*[c]	*Violations or other circumstances*
DuPont	311 N.L.R.B. 88	1993		Yes	8(a)(1) 8(a)(5)	Refusal to allow union communications, soliciting grievances, refusal to bargain, unilateral change, warnings, discharge
Ryder	311 N.L.R.B. 81	1993	Yes		8(a)(1)	Threats to withhold raises and to lay off
Salt Lake	310 N.L.R.B. 149	1993	Yes	Yes	8(a)(1) 8(a)(3) 8(a)(5)	Interrogations, threats, promises, discharges, refusal to bargain, unilateral change
Yukon	310 N.L.R.B. 42	1993	Yes	Yes	8(a)(1) 8(a)(3) 8(a)(5)	Interrogations, promises, surveillance, threats, eliminating benefits, discharge, refusal to bargain, unilateral change
Research Fed.	310 N.L.R.B. 13	1993	Yes	Yes	8(a)(1) 8(a)(5)	Threats, soliciting grievances, promises, granting benefits, refusal to bargain, unilateral changes
Electromation	309 N.L.R.B. 163	1992	Yes[d]		none	Organizing drive shortly after committees established, union lost, but then won board-ordered election after committees were disestablished
F.M. Transport.	306 N.L.R.B. 156	1992	Yes		8(a)(1) 8(a)(3)	Discharge, questioning, promises, threats
Camvac	288 N.L.R.B. 92	1988	Yes	Yes	8(a)(1) 8(a)(5)	Interrogations, promises, threats, granting benefits, unilateral change
Airstream	288 N.L.R.B. 28[f]	1988	Yes		8(a)(1)	Threats, granting improvements, discriminatory prohibition of literature distribution
North Am. Van	288 N.L.R.B. 11	1988	Yes		none	Union supporter fired but reinstated in settlement of 8(a)(3) charge refused to allow on committee

Table 11.1. NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93 (continued)

Abbreviated case name	Board number	Year	Organizing campaign[a]	Union in existence[b]	Other sections violated[c]	Violations or other circumstances
UARCO	286 N.L.R.B. 7	1987	Yes		8(a)(1) 8(a)(3)	Interrogations, threats, soliciting grievances, discharge
Otis Corp	285 N.L.R.B. 77	1987		Yes	8(a)(1)	Soliciting grievances, promises; bargaining order in previous case, then refusal to bargain in another
Memphis Truck	284 N.L.R.B. 99	1987		Yes	8(a)(3) 8(a)(4) 8(a)(5)	Refusal to sign collective bargaining agreement, violating contract, refusal to bargain, unilateral change, refused to rehire
Superior Coat	276 N.L.R.B. 55	1985	Yes		8(a)(1) 8(a)(3)	Impression of surveillance, threats, expressing the futility of organizing, discharge
Jet Spray Corp	271 N.L.R.B. 32	1984	Yes		8(a)(1)	Overly broad rules, threats, interrogations, urging employees to abandon union drive
Producers	270 N.L.R.B. 170	1984	Yes[d]		8(a)(1)	Promises, interfering with distribution of union materials
Lawson Co	267 N.L.R.B. 75[f]	1983	Yes		8(a)(1) 8(a)(3)	Granting unprecedented benefits, threats; asking employees to withdraw authorization cards and deal directly, saying they'd never deal with a union
Comet Corp	261 N.L.R.B. 188	1982		Yes	8(a)(1) 8(a)(3) 8(a)(5)	Discharge, refusal to bargain
Homemaker	261 N.L.R.B. 50[f]	1982		(Yes)[e]	8(a)(1)	Impression of surveillance, interrogation
Marhoefer	258 N.L.R.B. 71	1981	Yes	Yes	8(a)(1) 8(a)(5)	Soliciting complaints, promises, telling employees company would never sign a contract, threats

Table 11.1. NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93 (continued)

Abbreviated case name[a]	*Board number*	*Year*	*Organizing campaign*[b]	*Union in existence*[b]	*Other sections violated*[c]	*Violations or other circumstances*
K & E Bus[d]	255 N.L.R.B. 137	1981	Yes		8(a)(1) 8(a)(3) 8(a)(4)	Threats, interrogation, promises, granting improvements, discharge, layoffs, discriminatory refusal to hire or rehire
Walker Die Cast.	255 N.L.R.B. 34	1981		Yes[e]	8(a)(1) 8(a)(3) 8(a)(5)	Threats, surveillance, removing picket signs, discharge, refusal to reinstate, advising employees to resign, unilateral changes
Classic Industries	254 N.L.R.B. 149[g]	1981	Yes		8(a)(1)	Threats to subcontract or close down if union won
Streamway	249 N.L.R.B. 54[f]	1980	Yes		8(a)(1)	Interrogating about union views
Wisconsin Beef	249 N.L.R.B. 34	1980	Yes		8(a)(1) 8(a)(3)	Interrogations, threats, lay off due to union activity
American Feather	248 N.L.R.B. 147	1980	Yes	Yes	8(a)(1) 8(a)(3) 8(a)(5)	Refusal to recognize union and bargain, assuring striker replacements that strikers would never be reemployed, failing to place strikers on hiring list, granting wage increase, withholding cost-of-living allowance
St. Vincent's	244 N.L.R.B. 20	1979	Yes		8(a)(1)	Threats, promises, surveillance, interrogation
G.Q. Security	242 N.L.R.B. 84	1979	Yes		8(a)(1) 8(a)(3)	Decertification election, Teamsters intervened, threats, discharge solicitation and remedying grievances through committee
Worldwide	242 N.L.R.B. 40	1979	Yes	Yes	8(a)(1) 8(a)(5)	Campaigning for competing labor organization, announcing negotiations for benefits, refusing to recognize union and bargain, interrogations, threats
Stephens Inst	241 N.L.R.B. 71	1979	Yes		8(a)(1) 8(a)(3)	Interrogation, threats, bribing employees to abandon union activity, soliciting employees to observe a union meeting, discharge

Table 11.1 NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93 (continued)

Abbreviated case name	Board number	Year	Organizing campaign[a]	Union in existence[b]	Other sections violated[c]	Violations or other circumstances
Fry Foods	241 N.L.R.B. 42	1979	Yes[d]	Yes	8(a)(1) 8(a)(3) 8(a)(4) 8(a)(5)	Assults, thirty-three discharges, interrogations, threats, surveillance, harder working conditions, refusal to bargain, unilateral change
Kurz-Kasch	239 N.L.R.B. 107	1978	Yes		8(a)(1)	Falsifying hiring dates, interrogations, threats
Mercury	239 N.L.R.B. 4	1978	Yes		8(a)(1) 8(a)(3)	Discharges, interrogations, threats, promises, surveillance, polling
Morbark	237 N.L.R.B. 105	1978	Yes		none	Formed and bargained with committee during drive
Liberty	236 N.L.R.B. 201	1978	Yes		8(a)(1) 8(a)(3)	Impression of surveillance, threats, interrogations, transfers, layoffs, and discharge of union supporters
Ace Mfg	235 N.L.R.B. 113	1978	Yes		8(a)(1)	Interrogations, promises, surveillance
Northeastern U	235 N.L.R.B. 122[f]	1978			8(a)(1)	Denied "9 to 5" supporters access and refused to deal with them, but bargained with committee
Metrop Alloys	233 N.L.R.B. 145[g]	1977	Yes		none	Created and dominated committee and claimed it would be "just like a union"; presented a "collective bargaining agreement" to employees
Kux Mfg	233 N.L.R.B. 50	1977	Yes		8(a)(1)	Interrogations, threats, coercing employees to designate committee as their bargaining agent, polling, granting benefits

Table 11.1. NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93 (continued)

Abbreviated case name	*Board number*	*Year*	*Organizing campaign*[a]	*Union in existence*[b]	*Other sections violated*[c]	*Violations or other circumstances*
Federal Alarm	230 N.L.R.B. 78	1977	Yes	Yes	8(a)(1) 8(a)(3) 8(a)(5)	Interrogations, threats, refusal to bargain with union, recognizing and bargaining with committee
Interstate Engin.	230 N.L.R.B. 3	1977	Yes		8(a)(1)	Interrogation, impression of surveillance, threats of closure and discharge, promises
Mid-Continent	228 N.L.R.B. 98	1977		Yes	8(a)(1) 8(a)(5)	Refusal to bargain, polling, telling employees union could be voted out by a poll and they could bargain through committees
Internat'l Signal	226 N.L.R.B. 97	1976	Yes[d]		8(a)(1) 8(a)(3)	Discharge, discriminatory enforcement of no solicitation rule
Alta Bates	226 N.L.R.B. 65	1976		Yes	none	Found "dealing with" mandatory subjects, but not bargaining; no evidence of anti-union intent
Freemont Mfg.	224 N.L.R.B. 79	1976	Yes		8(a)(1) 8(a)(3)	Discharge, interrogation, surveillance
Surface Industr.	224 N.L.R.B. 35	1976	Yes	Yes	8(a)(1) 8(a)(5)	Interrogations, threats, surveillance, shutdown, refusal to bargain, unilateral changes
M-W Education	223 N.L.R.B. 67	1976	Yes		8(a)(1)	Interrogations, threats, raises, free meals
STR	221 N.L.R.B. 103	1975	Yes		8(a)(1) 8(a)(3)	Threats, suspensions, interrogations
Contract Knitter	220 N.L.R.B. 30	1975	Yes		8(a)(1) 8(a)(3)	Threats, surveillance, economic reprisals
RPI	219 N.L.R.B. 85	1975	Yes[d]		8(a)(1)	Interrogations, threats, promises

Table 11.1 NLRA Violations Concurrent with the Order to Disestablish Employee Committees, 1972–93 (continued)

Alleged related case name	Board number	Year	Organizing campaign [a]	Union in existence [b]	Other sections violated [c]	Violations or other circumstances
Rupp Industries	217 N.L.R.B. 65	1975	Yes		8(a)(1)	Threats, interrogation, pay raise
Herzka & Knowles	206 N.L.R.B. 32 [e]	1973	Yes		8(a)(1)	Threats of closing, laying off, and blacklisting
Lowen	203 N.L.R.B. 86	1973	Yes		8(a)(1)	Threats, committee established 2 months after union lost
Versatube	203 N.L.R.B. 87	1973	Yes		8(a)(1)	Promises, threats to close, chair of committee solicited grievances in presence of foremen
Money Olds	201 N.L.R.B. 22	1973	Yes		8(a)(1)	Granting rate increases
Gibbons	199 N.L.R.B. 88	1972	Yes		8(a)(3)	Discharges, refusal to reinstate
Solmica	199 N.L.R.B. 41	1972	Yes	Yes	8(a)(1) 8(a)(5)	Interrogations, promises, granting of benefits, refusing to bargain
Goulds Pumps	196 N.L.R.B. 118	1972	Yes		8(a)(1)	Warnings, interrogations, telling employees they didn't need to comply with Board subpoena

[a] Means that the 8(a)(2) charge was the result of an organizing campaign. Except as noted (see "d"), the committee was formed or changed its activity in apparent response to the campaign.

[b] Means a union coexisted with the committee. Where a union organizing campaign is also indicated, it means a union won an election, or a bargaining order was issued, during the period under investigation.

[c] The number listed is the 8(a) violation found in addition to the 8(a)(2) violation. An 8(a)(1) violation is indicated only if cause was found other than the 8(a)(2) violation itself. So if the 8(a)(1) violation is just "interference" resulting from an 8(a)(2) domination of a committee, then a 8(a)(1) violation is not listed.

[d] The committee was in existence before the organizing campaign, and there was no evidence that it changed its activity in order to undermine the campaign.

[e] U.S. Court of Appeals denied enforcement. No court of appeals ordered disestablishment when the board did not.

[f] U.S. Court of Appeals enforced.

[g] The union itself was dominated and actually amounted to no more than a committee.

Table 11.2. Employee Committees Disestablished by the NLRB, 1972–93: Summary Statistics

	1972–82	1983–93	Total
Number of disestablishment orders	41	17	58
Number of cases in which *no* ULPs were found (other than 8(a)(2) violations)	3	2	5
Cases in which the committee was formed or used in apparent response to organizing activity	32	12	44
Cases in which a union existed and the employer refused to bargain*	11	7	18
No other ULPs; committee was not formed or used in apparent response to organizing activity	1	1	2

* Some cases involve both union organizing and refusal to bargain, as explained in note b of table 11.1

266 N.L.R.B. 65, a 1976 case. In the latter case, a union was present, yet every issue taken up by the committee was an ordinary grievance of the type unions handle every day (with the possible exception of a request for a suggestion box). In every other case in which a union was present and a committee was disestablished, the board found a refusal to bargain. Not one of the fifty-eight cases contained any evidence that the committee in question had increased productivity, quality, or the decision-making authority of the employees.

All of this leaves us with a simple, stark conclusion: *There is absolutely no evidence that the NLRB has ever in the past twenty-two years disestablished a committee of the type employers say they must have to be competitive.*

Cases That Do Not Reach the NLRB

For the last three years, Lexis has included ALJ decisions that have not reached the NLRB. Among these were five cases in which the ALJ ordered disestablishment of a committee. None deviated from the pattern of NLRB cases described above.

Discussion

Employee Committees as Alternatives to Unionism

What of the arguments that employee committees could be a new form of representation that could fill the gap left by union decline? Richard B. Freeman and Joel Rogers (1993a), arguing for modifying the ban on company

unionism, state that current labor law presents workers with an "'all or nothing' choice in representation—traditional labor unions or none at all." But that is not true.

First, workers have the right "to form, join, or assist labor organizations" (Section 7), and, as we have seen, a nonunion committee can be a "labor organization." Workers also have a right under Section 7 "to engage in other concerted activity for mutual aid and protection." So workers can form organizations and act concertedly to attempt to persuade or pressure an employer even without unionizing. Clyde W. Summers (1990a) advocates doing exactly that.

Second, as this study shows, there is little chance that the board will disestablish more than a handful of the thousands of existing employee committees. If opportunities to experiment with alternative forms of "voice" are wanted, then they exist already. An overlooked tool is the Labor-Management Reporting and Disclosure Act. Sections 3(i) and (j) define the term "labor organization" similarly to the way it is defined in Section 2(5) of the NLRA. This means that people who are represented by employee committees that are "labor organizations" have a right of access to meetings, to address the committee without fear of reprisal, to elect the heads directly, and to be informed of those rights, and the committee must disclose its finances.

At Polaroid Corporation, a committee was challenged as undemocratic under the LMRDA. Polaroid's CEO abolished the committee rather than allow elections for its chair and vice chair (*Daily Labor Report*, June 23, 1992, A2–A3; *Scivally v. Graney*, 143 L.R.R.M. 3043 (1993)). The potential for exercising LMRDA rights has not been tapped; unions could use them to educate workers about democracy in the workplace.

A more serious problem with the promotion of nonunion committees is that they are assumed to have value as an alternative to "traditional" unionism. The value of unionism has been painstakingly documented. Unions are known to improve wages and benefits, reduce turnover, increase equality of wages, protect the jobs and income of older workers (Freeman and Medoff 1984), and make the Occupational Safety and Health Act (OSHA), useless in nonunion firms, into an important tool for safety (Weil 1991). They make substantial gains even in first contracts (Bronfenbrenner 1993:471). In contrast, the value of employee committees is simply taken on faith.

Should Labor Trade 8(a)(2) for Something Else?

Would some degree of change in 8(a)(2) be worth trading for something that would make it easier to organize? First of all, what would employers give up to get such a change? Probably not much, because, as we have seen, they are not actually harmed by 8(a)(2). But more important, the employers used the employee involvement issue phenomenally well to derail the Commission on

the Future of Worker-Management Relations and just about everyone else from the issues that matter to labor and working people. Employers have accomplished this without a single argument they could back up with facts They are very powerful in Congress. Against that opposition, if labor engages in horse-trading, what will come of it? Consider this scenario: By the time such a trade gets through Congress, Section 8(a)(2) will be dead, and the labor movement will wind up with a pale ghost of the new rights it thought it was getting.

Furthermore, any change would present real hazards, no matter how carefully drafted. The recent *Du Pont* decision (311 N.L.R.B. No. 88 (1993)), along with earlier cases, provides valuable precedent that should not be lightly cast into doubt. No one can predict what the altering of 8(a)(2) or 2(5) would be used to justify in years to come. Who would have guessed when the Taft-Hartley Act was drafted that forty-five years later a board member would argue that, in adding new language to the first section, Congress must have intended a change in 8(a)(2), even though Congress specifically rejected such a change? Yet that is what member John Raudabaugh did in his concurrence in *Electromation*.

What Labor Stands to Lose

The *Du Pont* decision affirmed that unions can insist on bargaining over employee involvement plans that deal with bargainable issues and employers cannot implement such plans without the union's agreement. This is not just a right to bargain; it is veto power. It may even apply to plans that deal only with nonmandatory subjects.[3]

Whether unions should participate in employee involvement is the subject of rich debate within the labor movement. But it would be a mistake to inject that controversy into the debate over labor law reform. Those who reject employee involvement obviously do not want to lose their legal basis for challenging it, but it should be just as obvious that unions engaged in employee involvement must preserve their right to bargain over the plans and to reject anything that they believe is not legitimate.

Could weakening 8(a)(2) hurt organizing? The small number of disestablishment cases, as well as their decline during the 1980s, contrasts sharply with the rise in 8(a)(3) discharges (Freeman and Medoff 1984). This suggests that employee committees are not often the employers' weapon of choice in organizing drives. But two independent studies show that union win rates are exceptionally low where employee committees exist (Bronfenbrenner 1993:313;

3 The April 15, 1993, memorandum of NLRB general counsel Jerry M. Hunter leaves open this possibility and directs the regional offices to submit such cases for advice *Daily Labor Report*, April 26, 1993, G-9.

AFL-CIO 1984:6). This fact will not be lost on employers if unions begin to make organizing gains.[4]

Section 8(a)(2) is a fifty-nine-year-old law forbidding a practice that has historically proven to be a potent antiunion device. It cannot prevent employers from using committees during organizing campaigns, but it places important limits on them. If it is weakened, a future generation of organizers may scorn us for it.

Finally, the principle of unionism independent of employers represents a vital human need in our society, no matter how dire labor's decline may be. There is dignity in creating one's own organization, in choosing one's own representatives, and in recognizing and acting on the common interests and vulnerabilities of workers dependent on property owners for a livelihood. There is no substitute. Weakening Section 8(a)(2) would be a portentous event, a death knell of an entirely different sort from the one predicted by the eleven members of Congress who lobbied the NLRB in *Electromation*.

What It Will Take to Achieve Positive Reform

The call for modifying 8(a)(2) is based on a bold misrepresentation of its impact in the workplace by employers, combined with uncritical acceptance of the employers' arguments and other assumptions by many others. It has reached a crescendo that has nearly drowned out the real needs of working people.

In 1988, the Massachusetts building trades faced a referendum campaign against the prevailing wage law. The campaign was organized by the Associated Builders and Contractors, joined by a tax revolt group. The trades defeated the campaign by creating alliances with other unions, civil rights organizations, religious organizations, and other groups and by convincing voters that the law was in the public interest (Erlich 1990). If that is what it took to save an existing law, what will it take to achieve positive reform? Even granting that labor law is not made by referendum, can it really be accomplished without organizing public support well beyond the labor movement itself?

4. A recent article entitled "Scary New Union Activism . . . How to Fight It and Win," urges, "Despite some discouraging rulings by the (NLRB), . . . we strongly recommend that all companies find ways to set up more employee involvement opportunities" as a way of countering new organizing tactics (Cabot 1993:5–6). The activities it advocates, however, are clearly limited in important ways by 8(a)(2).

The Honorable Senator Kassebaum
Chairman, Labor and Human Resources Committee
United States Senate
302 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kassebaum:

I am the attorney of record for Electromation in the case which resulted in the 1992 decision by the National Labor Relations Board. Although I am unable to attend the upcoming hearing on the proposal to amend Section 8(a)(2) of the National Labor Relations Act, and it is unknown what testimony the Union will offer at the hearing, I would like to correct misrepresentations made by Judith A. Scott, Teamsters general counsel, at the hearings before the Dunlop Commission made in late 1994, in the event the same misstatements are made before this tribunal:

1. **Misstatement:** "Electromation's production employees are predominantly working women who make $6 an hour."

Correction: While Electromation's workforce is primarily female, the production workforce makes almost $7 an hour ($6.85).

2. **Misstatement:** "Its management has been entirely male. "

Correction: All supervisors are female. Even the production manager is female. Back at the time of the election, the vast majority of supervisors were female as well.

3. **Misstatement:** "Most official accounts of the Electromation case end with management's withdrawal from the action committees following the Teamsters' official request for recognition ... Rather than stepping back and letting the workers freely choose their own vehicle for representation, management brought out plenty of old fashioned scare tactics during the Teamsters organizing drive. They threatened employees with tales of other unionized plants in the area which closed, featuring pictures of tombstones symbolizing those plants. It subjected employees to captive audience meetings which included the showing of anti-union movies. It also promised to reinstate the action committees if the employees voted against the Teamsters."

Correction: After the Teamsters petitioned for an election, management advised all committees that it would not participate in the action committees during the pre-election period in order to avoid tainting the laboratory conditions which attach during that time. The employees were instructed that they were free to continue to meet on their own or not, as they so chose. Some committees continued to meet; others did not. During the weeks before the election Electromation educated the employees on the practical aspects of being represented by a union so that the employees could make an intelligent, enlightened decision when they voted.

The Teamsters lost the election narrowly and then filed unfair labor practice charges alleging that management had unlawfully threatened to close if the Union were elected, had interrogated employees as to how they intended to vote, and had illegally set up and run joint management-employee committees. The Union also filed objections to the election relying on the same factual assertions, thereby preventing the Board from certifying the results of the election.

The ALJ ruled that Electromation acted lawfully throughout the campaign. Electromation did not unlawfully threaten or interrogate its employees as alleged by the Teamsters.

Although Ms. Scott says management promised to reinstate the action committees if the employees voted against the Teamsters, it should be noted that the Teamsters never made this the subject of an unfair labor practice charge or objection to the election. Moreover, her statement is false. Management made no promises whatsoever

regarding the committees being reinstated. When asked by employees, management responded that it could not meet with committees during the pendency of the election. (While management originally intended to begin meeting with employees again after the election regardless of its outcome, it was prohibited from doing so by the ALJ's order finding that the committees were in violation of Section 8(a)(2) and ordering that they be disbanded.)

4. **Misstatement:** "A male supervisor encouraged female employees to vote against the Union while putting his arm around them. These employees pursued a sexual harassment complaint."

Correction: Management has absolutely no knowledge of a male supervisor putting his arm around female employees. To the extent this may have happened, there was not one employee who complained to Electromation's management. Nor was this allegation ever made a part of the Teamsters unfair labor practice charge. Nor was a sexual harassment charge ever filed against the Company containing this allegation.

5. **Misstatement:** "[I]n a rerun election that was held because of the employer's misconduct, the workers voted for Teamster representation."

Correction: While it is true that a second election was held, it was not a rerun election. Approximately 18 months had passed since the first election. Electromation's appeal of the ALJ's decision regarding the action committees being a violation of Section 8(a)(2) was pending before the National Labor Relations Board. The Teamsters objections to the election related to the action committees were also still pending. At that time, the Teamsters, believed that it had gained sufficient support from the workforce that it could win an election. Accordingly, the Teamsters petitioned the Board to withdraw their objections to the first election so that the NLRB could certify its results, and thus lifting the bar to seek another election. The Teamsters then filed a petition for an election. The election was held and the Teamsters won by a very narrow margin in November, 1990.

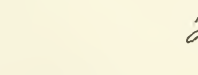
6. **Misstatement:** "During negotiations for a contract, Electromation laid off all but three of its employees due to a purported loss of business .... shortly after the contract was ratified ... Electromation's business mysteriously picked up and most workers were recalled from layoff."

Correction: Although there was a reduction in force, it was totally unrelated to the election of the Union or the contract negotiations. Electromation manufactures electrical and electronic components for automotive and outdoor power equipment. Examples of their products are trunk release switches, trunk pull-down switches, and wiring harnesses that go under vehicles. Their largest product at that time was a solenoid that was part of a passive restraint system used on some vehicles. Just prior to negotiations, Electromation's largest customer pulled all its orders for passive restraint solenoids as it began using airbags in its vehicles. The loss of that business, in conjunction with the general economic recession at that time, resulted in Electromation reducing its workforce until it was able to bring in additional work to make up for the losses. At its lowest point, Electromation was down to six production workers. As new work was brought in, management was able to call back employees. However, the contract with the Teamsters was ratified and signed several months before Electromation had sufficient business to bring back the majority of its workforce. Ms. Scott's portrayal of management's aversion to the Teamsters is absolutely untrue and without any factual basis. It should be noted at that time, Electromation was one of five subsidiaries of American Electronic Components, and it was the only subsidiary which was not organized by a union.

I thank you for the opportunity to clarify misrepresentations and for the Legislature's willingness to consider reform of Section 8(a)(2).

Respectfully submitted,

BARNES & THORNBURG



Kathleen K. Brickley

FORMER NLRB CHAIRMAN MILLER CALLS *ELECTROMATION* PROBLEM 'MYTH'

Last year's National Labor Relations Board decision in *Electromation* has not hampered companies from operating employee involvement programs, and any changes in federal labor law intended to enhance the opportunity for establishing such programs should be considered carefully, former NLRB Chairman Edward B. Miller recently told the Commission of the Future of Worker-Management Relations.

In written testimony submitted for the commission's regional meeting in East Lansing, Mich., earlier this month, Miller argued that "[i]t is indeed possible to have effective [employee involvement] programs of this kind in both union and non-union companies without the necessity of any change in the current law." He asserted that the "so-called *Electromation* problem" is simply a "myth."

In *Electromation*, the board ruled last December that employee involvement committees established by the Illinois electronics firm were illegal labor organizations dominated by management (244 DLR AA-1, E-1, 12/18/92). Some observers have argued that the ruling has had a chilling effect on involvement programs at a time when more employee participation is need to enhance productivity.

Miller, who is now senior labor counsel for Pope, Ballard, Shepard & Fowle Ltd., Chicago, said that among companies with employee involvement programs represented by his firm, none has faced unfair labor practice charges since the ruling was issued. "It is indeed possible to have effective programs of this kind in both union and non-union companies without the necessity of any change in current law," he said.

Miller cautioned against any repeal of Section 8(a)(2) of the National Labor Relations Act in an effort to better accommodate employee involvement programs. "While I represent management, I do not kid myself," Miller said. "If Section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur." Any modification in the law needs to include provisions prohibiting representation plans or involvement programs intended to inhibit unionization or enable companies to substitute sham unions for real unions, he said.

Legislation (HR 1529, S 669) was introduced in March to amend Section 8(a)(2) to allow for the establishment of employee participation programs dealing with productivity and efficiency (60 DLR A-14, 3/31/93). The House version, offered by Rep. Steven Gunderson (R-Wis), currently has 24 co-sponsors. Observers generally expect the legislation will not move unless it is incorporated into a broader package of reforms.

Other 'Myths' Debunked

In his written comments to the commission, Miller took exception to claims often put forward by organized labor and other critics of the present system that representation elections take too long. Miller charged that it is a "myth" that the election process is dragged out to the detriment of unions. "The fact is most employers do not even ask for a hearing when an election petition is filed," he said. "As a result, in fiscal year 1992, 84.4 percent of the elections were conducted by agreement and were fully completed within 48 days after the filing of the petition," he said.

Miller said it is also a myth that when there is a hearing, proceedings are dragged out endlessly. "The time lapse from filing of petition to the close of hearing is now in the low 20 day area, and the median decision time has continued to improve to 43 days in fiscal year 1992," he said. In the cases where a hearing was required, the median time in 1992 from the filing of the petition in election was only 76 days.

Miller said he rejects the argument that unions lose elections because of employer misconduct. He noted that in 1992 objections were filed in only 6.2 percent of elections conducted and were found to have merit in only 2.1 percent of the elections.

The CHAIRMAN. That concludes today's hearing. Thank you all.
[Whereupon, at 12:01 p.m., the committee was adjourned.]

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